

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : April 26, 2013

COMPLETE TRANSCRIPT OF THE CLOSING ARGUMENTS
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV00620, ePlus, Incorporated, versus Lawson Software, Incorporated. Ms. Jennifer A. Albert, Mr. Michael G. Strapp, and Mr. Craig T. Merritt represent the plaintiff.

Mr. Jason C. Lo, Mr. Daniel Thomasch, Mr. Josh Krevitt, Mr. Dabney J. Carr, IV, Mr. Richard W. Mark, and Mr. Christopher D. Dusseault represent the defendant. Are counsel ready to proceed?

MS. ALBERT: ePlus is ready, Your Honor.

MR. THOMASCH: Ready for defendant, Your Honor.

THE COURT: All right. We'll start with the colorability analysis. Just because you have an hour doesn't mean you need to use an hour, but it's available to you. That will be the duration. All right.

MS. ALBERT: Good morning, Your Honor.

THE COURT: Good morning.

MS. ALBERT: I'm going to reserve any of my 30 minutes that might be remaining for rebuttal to Lawson's arguments.

THE COURT: Good. Just remember, somebody on your side needs to kind of keep the time, because we're not.

MS. ALBERT: I'm going to be addressing the

1 no-colorable-difference and infringement issues, and my
2 partner Mr. Strapp will be addressing the remedies issues.

3 After a five-day evidentiary hearing, ePlus has
4 established by clear and convincing evidence that Lawson's
5 sole modification to infringing configurations three and
6 five does not render those configurations more than
7 colorably different from the infringing configurations and
8 that the modified configurations continue to infringe
9 claim 26 of ePlus's '683 patent.

10 The evidence on these issues comes from the
11 admissions of Lawson's own witnesses and its own documents
12 and system. It certainly meets the clear and convincing
13 evidence standard.

14 I would like to review just briefly the
15 configurations that were found to infringe. This slide
16 shows configurations three and five and all of the modules
17 --

18 THE COURT: Do you have paper versions of this?
19 If you do, hand them out, please. Oh, demonstratives,
20 okay, I see. On colorability. I apologize. When did
21 that book show up here?

22 MS. ALBERT: There is no dispute between the
23 parties that the sole modification at issue was made to
24 just one module of these multi-module configurations. The
25 green box for Requisition Self-Service was modified, and

1 Lawson renamed that Requisition Center.

2 There's also no dispute that the sole
3 modification at issue is that Lawson removed from RQC a
4 user ability to combine either, one, items from item
5 master and a Punchout vendor, or, two, items from multiple
6 Punchout vendors in a single requisition.

7 The clear and convincing evidence established
8 that the sole modification made to RSS did not render the
9 RQC configurations three and five more than colorably
10 different than configurations three and five with RSS for
11 several reasons. First --

12 THE COURT: May I ask you this question so that
13 I'm sure I understand your positions on it? In
14 configuration three, can Requisition Self-Service be used
15 without the S3 procurement modules and the platform
16 technology foundation?

17 MS. ALBERT: No.

18 THE COURT: Can Procurement Punchout be used
19 without Requisition Self-Service and the S3 procurement
20 module and the platform together?

21 MS. ALBERT: No, Your Honor. That evidence was
22 established at the underlying trial.

23 THE COURT: And the electronic data interchange,
24 can that be used without the S3 procurement modules and
25 the platform technology foundation?

1 MS. ALBERT: No, Your Honor.

2 THE COURT: And can the electronic data
3 interchange be used without Requisition Self-Service?

4 MS. ALBERT: It can be used without Requisition
5 Self-Service and Procurement Punchout. That's why it's
6 shown on the other side of the blue building block, that
7 it requires all of the modules underneath it, but it can
8 operate side by side with the Requisition Center and
9 Procurement Punchout.

10 THE COURT: But you can't just use -- can you
11 just use electronic data interchange by itself?

12 MS. ALBERT: Well, you would need to generate a
13 purchase order --

14 THE COURT: Is the answer no --

15 MS. ALBERT: No. The answer is no.

16 THE COURT: You can't use it by itself. All
17 right, I understand.

18 MS. ALBERT: Now --

19 THE COURT: Do you understand there to be no
20 dispute over those facts?

21 MS. ALBERT: I understand there to be no dispute
22 those facts were established at trial and affirmed by the
23 Federal Circuit.

24 THE COURT: All right.

25 MS. ALBERT: Your Honor, ePlus contends for at

1 least three reasons that the sole modification that's been
2 made to configurations three and five does not render
3 those configurations more than colorably different from
4 infringing configurations with RSS.

5 First, the sole modification relates to a feature
6 that has no relevance to claim 26. It is a randomly
7 chosen feature and cannot render the RQC configurations
8 more than colorably different from the infringing
9 configurations with RSS as a matter of law.

10 Second, there were no modifications made to the
11 modules of configurations three and five that perform the
12 infringing functionality of claim 26. Third, Lawson
13 itself --

14 THE COURT: That is your argument based on
15 *Arlington Industries*; is that correct?

16 MS. ALBERT: Correct.

17 THE COURT: Is there any case other than
18 *Arlington Industries*, or is there any case including
19 *Arlington Industries* that takes the ruling -- that takes
20 the principle that you are relying on as far as you take
21 it, or are you asking me to be the first court to do that?

22 MS. ALBERT: Well --

23 THE COURT: In that a court has held that if a
24 modification is not related to any requirement of a claim,
25 that perforce it -- that is not -- there isn't a change

1 that makes any difference in the case.

2 MS. ALBERT: Well, *TiVo* itself said that the
3 analysis must focus not on differences between randomly
4 chosen features of the product found to infringe.

5 THE COURT: I understand that's what it says.
6 I'm asking you if there's been any case where that
7 principle was applied in precisely the same way that you
8 are asking me to apply it here.

9 MS. ALBERT: I'm aware of *Arlington Industries v.*
10 *Bridgeport*.

11 THE COURT: And that's all?

12 MS. ALBERT: I'm not sure if there are any other
13 cases subsequent to *TiVo*.

14 THE COURT: It's the only one that comes close.
15 I'm not even sure it does, but I certainly -- I couldn't
16 find anything else. All right. Excuse me, go ahead.

17 MS. ALBERT: The third reason why ePlus believes
18 that the change does not render the configurations more
19 than colorably different is because Lawson itself
20 acknowledged, both internally and externally to its
21 customers, that the modification it made to RSS was
22 insignificant, insubstantial, minor, and trivial, and did
23 not impact on the procurement functionality needed by its
24 customers.

25 As I mentioned, the Court's analysis as to

1 whether the RQC configurations are more than colorably
2 different from the infringing configurations must focus on
3 whether the modifications were made to randomly chosen
4 features of the product found to infringe or, instead, to
5 features that were the basis for the prior finding of
6 infringement, and the Federal Circuit made clear that
7 modifications that relate only to randomly chosen features
8 of the product found to infringe, in other words,
9 modifications that relate to features that have nothing to
10 do with the claim elements are irrelevant. They cannot
11 render the product more than colorably different from the
12 infringing product.

13 THE COURT: In your view, the analysis is to
14 compare the product, the feature of the product that was
15 found to infringe, using the jury's verdict of what was
16 infringed, against the modification, and that's as far as
17 you go.

18 MS. ALBERT: No. *TiVo* says --

19 THE COURT: In making colorability.

20 MS. ALBERT: *TiVo* says to compare the infringing
21 product to the newly accused product. That's why we look
22 to the configuration as a whole and ask whether the
23 modification made renders the configuration as a whole
24 more than colorably different.

25 THE COURT: Don't you have to find out that which

1 was the feature that was alleged to be infringed?

2 MS. ALBERT: Yes. You first --

3 THE COURT: In other words, let's say there were
4 three features, and only one of them was the topic of the
5 charge of infringement. If they modified feature two and
6 three, it doesn't make any difference according to you.

7 MS. ALBERT: Correct.

8 THE COURT: Because that's not the analysis that
9 you make. It's whether they modified feature one.

10 MS. ALBERT: Correct.

11 THE COURT: All right.

12 MS. ALBERT: And cases subsequent to *TiVo* have
13 provided further guidance on this question of whether the
14 modification was made to a randomly chosen feature, and we
15 mention this *Arlington Industries v. Bridgeport* case.

16 THE COURT: But that's the only one that deals
17 with this. You say cases subsequent, and you mention
18 that, but there isn't another one, is there?

19 MS. ALBERT: Not to my knowledge.

20 THE COURT: Has somebody else come out with one
21 since you all --

22 MS. ALBERT: No, Your Honor. Here, because claim
23 26 of the '683 patent does not require the ability to
24 combine either items from item master and the Punchout
25 vendor or items from multiple Punchout vendors in a single

1 requisition, it is a randomly chosen feature and is
2 irrelevant to step one of the *TiVo* analysis.

3 Now, the clear and convincing evidence
4 established that there are no changes made to many of the
5 modules of the infringing configurations that perform the
6 actual steps of claim 26.

7 THE COURT: And they don't dispute that.

8 MS. ALBERT: They don't dispute that. Indeed,
9 Lawson's development team analyzed each of these
10 infringing modules and functionalities and determined that
11 they could not be removed without crippling the product,
12 and we heard from Mr. Christopherson on that.

13 Lawson's own brochures and documents also confirm
14 that there are no changes made to the core procurement
15 functionality used to practice the elements of claim 26.
16 For example --

17 THE COURT: Does it make a difference to the
18 ultimate finding that there was no change made to the
19 functionality?

20 MS. ALBERT: Well, then --

21 THE COURT: Or is that just evidence of how
22 insignificant the change is?

23 MS. ALBERT: That is evidence of how
24 insignificant the change is.

25 THE COURT: And that is the importance of that

1 argument.

2 MS. ALBERT: Correct. When you compare the
3 infringing system configurations to the accused system
4 configurations, the fact that there were no modifications
5 made to the modules and the features that are used to
6 perform the steps of claim 26 indicates that the change
7 that was made is insignificant, trivial, and one to a
8 randomly chosen feature that's irrelevant under *TiVo*.

9 THE COURT: But under a set of facts different
10 than this one, you would not contest that there could be
11 changes that would be made to only one small component of
12 the functionality and that that could be colorably
13 different conceptually.

14 MS. ALBERT: Correct, Your Honor.

15 THE COURT: It's just that it is not in this case
16 based on the evidence in this case. That's your position.

17 MS. ALBERT: That's correct, Your Honor.
18 Lawson's own brochures and documents confirm that there
19 are no changes made to the core procurement functionality
20 used to practice the elements of claim 26.

21 For example, Lawson's Requisition Center and
22 Procurement Punchout brochure, which is found at
23 Plaintiff's Exhibit 1003, confirms that a system having
24 RQC and Punchout can be used to search the item master for
25 desired items, can be used to connect to a Punchout site

1 to shop for items. It further confirms that a user
2 continues to have the capability to consolidate multiple
3 types of products and services into a single requisition
4 which the system can process to generate multiple purchase
5 orders from that single requisition.

6 Additionally, the PowerPoint from Lawson's RQC
7 customer webinar found at Plaintiff's Exhibit 1102
8 confirms that there are no modifications made to either
9 EDI or Punchout, and EDI and Punchout, as you recall, were
10 the features that were relied upon for the determining
11 availability and inventory step of claim 26.

12 The clear and convincing evidence established
13 that Lawson itself, both internally and externally,
14 described the modification made to RSS to form RQC as
15 being a minor, trivial, and insignificant one.

16 Lawson's own personnel that had technical and
17 support responsibilities related to RQC acknowledged that
18 the modification made to RQC -- or made to RSS to form RQC
19 was insignificant in their internal communications. For
20 example, one document that we saw during the hearing was
21 Plaintiff's Exhibit 1030. There, Matthew Bragstad of
22 Lawson is describing the changes RQC has brought to
23 Lawson's support leadership team.

24 He said, "The process in which Punchout is being
25 performed has changed slightly. You now get a warning

1 popup that you are about to leave the Lawson site when you
2 punch out. The process remains completely the same except
3 if you try to punch out on a req that is already in use
4 with non-Punchout items, it will tell you that you need to
5 open a separate req, and it will perform that action for
6 you."

7 THE COURT: After that statement was made, were
8 there any changes made, any modifications made to get to
9 the modification that's at issue here?

10 MS. ALBERT: This describes the Punchout
11 modification, or the modification to the requisitioning --

12 THE COURT: I know, but the process was ongoing
13 at one time or another, and my question is, after this
14 statement was made, were there any other alterations of
15 any kind that show up in the modification that we're
16 dealing with here?

17 MS. ALBERT: This particular document talks about
18 the change that was made to prevent an item master item
19 and a Punchout item from appearing on the same
20 requisition. There is an additional change that prevents
21 an item from one Punchout website from being on a
22 requisition with another Punchout website. That is not
23 discussed in this particular --

24 THE COURT: Was that change, the latter one that
25 you just described, made before or after this memorandum

1 was prepared is my question, I suppose.

2 MS. ALBERT: I believe the memorandum predates
3 the second change.

4 THE COURT: All right. Thank you.

5 MS. ALBERT: As you recall, in the same
6 communication, Mr. Bragstad asked Mr. Christopherson, who
7 led the RQC development team, to confirm whether his
8 description of the changes was accurate, and Mr.
9 Christopherson replied, "Matt, you summed it up very
10 well."

11 Mr. Christopherson also confirmed in his
12 testimony at the hearing that he had told Lawson
13 personnel, quote, there was not one moving part in our RSS
14 that changed for RQC.

15 We also saw numerous documents authored by Scott
16 Hanson, the head of the RQC SWAT team responsible for
17 assisting customers in installing RQC, acknowledging the
18 trivial nature of the modifications made to RSS. For
19 example, in Plaintiff's Exhibit 1072, Mr. Hanson confirmed
20 that RQC was a change to the user interface only. "The
21 procurement business functionality and data remains the
22 same. If the user uses RSS already, they will intuitively
23 be able to use the RQC product. There is very little
24 change in the functionality."

25 So he concluded his communication by stating,

1 "test what has changed, which is really nothing."

2 In Plaintiff's Exhibit 1124, Mindy Klebe, one of
3 two Lawson employees responsible for customer support on
4 RQC, indicated in an internal communication, quote,
5 Requisition Center is installed here. I've tested it. It
6 works the same as RSS xml. There are some cosmetic
7 changes. It looks, appears exactly like RSS xml did.
8 Users will probably not even notice the difference really.

9 The clear and convincing evidence, namely
10 Lawson's own documents and witnesses, also establish that
11 Lawson told its customers that RQC delivered the same
12 functionality as RSS. For example, at the RQC customer
13 webinar that had over 800 customer attendees, Lawson told
14 its customers, quote, RQC contains 100 percent of
15 functionality customers require. That's at Plaintiff's
16 Exhibit 1102.

17 Lawson told its customer Cleveland Clinic, quote,
18 with regard to Punchout and SciQuest, RQC will function as
19 RSS did. We support one Punchout vendor website per
20 connection. SciQuest will come back with multiple vendors
21 on the same requisition with one punch-out.

22 There was also evidence that Lawson's customers
23 considered the modification to be insignificant and
24 trivial.

25 THE COURT: Go to the point that you are

1 describing changes called competing adjectives, number 11.
2 The statement attributed to Lawson's outside counsel, what
3 document are you citing to there and when was that
4 statement made? April 22, 2013.

5 MS. ALBERT: That's in Lawson's post-hearing
6 brief.

7 THE COURT: That's the briefing in this case.

8 MS. ALBERT: Correct.

9 THE COURT: And you are comparing that with what
10 the people at Lawson said later -- I mean earlier.

11 MS. ALBERT: Correct. The statement in the
12 column on the left is from Lawson's post-hearing briefing
13 where they are contending that the changes have severely
14 limited the circumstances under which a user has the
15 ability to comparison shop.

16 THE COURT: Okay.

17 MS. ALBERT: In contrast, in their user
18 administration guide with respect to Punchout, they say
19 that you can seamlessly browse Punchout-enabled websites.
20 In Lawson's post-hearing brief, they say claim 26 proved
21 to be impossible for Lawson to design around without
22 significantly impairing functionality, whereas in the RQC
23 customer webinar, Lawson's employees told customers that
24 RQC contains 100 percent of the functionality customers
25 would require.

1 Now, Lawson does seek to run away from its
2 statements in its documents by saying that those were
3 merely marketing puffery, but Mr. Lohkamp testified during
4 the hearing that Lawson intends to be truthful and
5 accurate in its statements and presentations to its
6 customers.

7 Lawson contends now in this contempt hearing that
8 the modification impacts the users' experience, but that
9 is belied by representations that Lawson made to its
10 customers that they would see no negative impact from the
11 slight product configuration change and that RQC was
12 actually better than RSS.

13 And on the right-hand side of slide 13, we have a
14 statement from Lawson's CEO, Harry Debes, that was made in
15 a communication to its customers after the Court entered
16 an injunction where he said, quote, we have developed a
17 replacement solution, Lawson Requisition Center, which we
18 believe to be superior to the existing RSS solution.

19 Now, Lawson represents that users are unable to
20 perform comparison shopping; however, Mr. Christopherson
21 of Lawson confirmed that a user of the Lawson system with
22 RQC and Punchout can still comparison shop among the
23 products offered by different vendors by performing
24 searches of different items in item master in the same way
25 that a user of the Lawson system with RSS and Punchout

1 could.

2 Lawson's expert, Dr. Goldberg, also confirmed
3 that users of the Lawson systems can compare items found
4 in searching a Punchout site in the same way that
5 comparison shopping functionality existed in the systems
6 with RSS and Punchout.

7 Now, Lawson also contends that the change is
8 significant because it impacts the requisition approval
9 process, but this argument is really a red herring.
10 There's no element of claim 26 that relates to approvals
11 of a requisition, and there was no evidence presented at
12 the hearing that the requisition approval process took
13 longer than for systems having RSS. No customer testified
14 to that, no one demonstrated the requisition approval
15 process. In fact, Lawson told its customers that RQC
16 actually streamlined purchasing processes.

17 The Lawson litigation-inspired arguments about
18 the significance of the modification cannot be squared
19 with what its employees said internally and to its
20 customers about the insignificant nature of the change
21 made to RSS.

22 In conclusion, ePlus has established through
23 clear and convincing evidence through Lawson's own
24 admissions that configurations three and five with RQC are
25 not more than colorably different from infringing

1 configurations three and five with RSS.

2 THE COURT: All right, I'll hear Mr. Thomasch on
3 colorability at this time or whoever is going to argue it.

4 MR. THOMASCH: I will. Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. THOMASCH: May I first have the configuration
7 slide.

8 THE COURT: Do you have these on paper?

9 MR. THOMASCH: This is actually just their slide.
10 I don't have a separate slide show, Your Honor.

11 THE COURT: There's 1-A and 1-B.

12 MR. THOMASCH: 1-A. I just want to follow up on
13 questions that Your Honor asked of Ms. Albert and make
14 sure that the record is complete on that. I do agree with
15 her that, for instance, to use Procurement Punchout on
16 configuration three or five you must have the things that
17 are directly below it in that chain. To use Requisition
18 Center, you need to have the S3 and the platform
19 technology. That's accurate.

20 Looked at the other way, of course, you can use
21 the S3 procurement module and the platform technology
22 alone. Those are a self-standing configuration. That's
23 configuration two. It's configuration one if it just has
24 the S3 procurement and the platform technology. That's a
25 fully serviceable operation that was at issue. If you add

1 Requisition Center to that without Punchout, that can be
2 used. That's fully functional. That's configuration
3 number two.

4 The other thing you asked then was over on five.
5 You said, will electronic data interchange, can you use
6 that by itself, and the answer was no. And as far as that
7 answer goes, that's correct. You can't use electronic
8 data interchange alone, but you can use electronic data
9 interchange with just the things underneath it, with S3
10 procurement and with platform technology.

11 THE COURT: Without requisition self-service or
12 Punchout procurement.

13 MR. THOMASCH: Right. You don't need those, and
14 if you're --

15 THE COURT: I think she said that.

16 MR. THOMASCH: If you are using electronic data
17 interchange with those that are underneath it, that's
18 using item master and EDI together, and they accused item
19 master and EDI of infringing claim 26 at issue in this
20 case, and the jury said no infringement on claim 26. EDI
21 and item master were present, and that was the theory of
22 infringement in configuration four, and the jury said
23 claim 26, no infringement.

24 Your Honor, the eligibility issue is where
25 they're sort of all in. They -- really, after that, I

1 think, it's pretty much going through the motions, but
2 they say that we're not eligible to be considered for
3 colorability because under the *Arlington Industries* test,
4 we can't link up what we modified to the claim element
5 with enough connection for their purposes.

6 Now, the question of how much connection is
7 necessary -- because I think we all agree there has to be
8 some connection. The question of how much --

9 THE COURT: I'm not sure they do.

10 MR. THOMASCH: Well, I think actually their
11 position is that the change needs to so link to the claim
12 element that the claim element is no longer practiced, and
13 if you change something so that you lose what they call
14 losing the infringing capability, then they would say,
15 well, that's good enough. That, of course, conflates the
16 infringement analysis together --

17 THE COURT: What position -- what do you take to
18 rebut their position? What does the modification do that
19 infringes or that deals with some claim of 26 to begin
20 with?

21 MR. THOMASCH: Your Honor, claim 26 has six
22 elements. The two-part limitation on the functionality of
23 Punchout has direct relevance to element one, two, three,
24 and four. It does not affect element five or six, at
25 least directly.

1 So it doesn't affect the creation of purchase
2 orders or the checking of inventory. Those can be done,
3 but it is relevant to maintaining at least two product
4 catalogs, and it's clearly relevant --

5 THE COURT: One, two, three, and what?

6 MR. THOMASCH: Four. It is clearly relevant to
7 selecting the catalogs to search. It puts a prohibition
8 on the circumstances under which you can select a catalog
9 to search. It affects the searching criteria among the
10 selected catalogs, because if you put a limitation on what
11 you can select to search, then you have a limitation on
12 what you can search, and that limitation carries through
13 to the requisition that you are building with a product of
14 the search of the selected catalogs.

15 THE COURT: So I understand it, you are saying in
16 the way you've described, the modification affects
17 elements one, two, three, and four of claim 26.

18 MR. THOMASCH: Yes. Now, Your Honor --

19 THE COURT: And, therefore, the principles of
20 *Arlington* don't apply here.

21 MR. THOMASCH: Correct. *Arlington*, I just want
22 to note, Your Honor, it is fascinating that they go to
23 *Arlington* to explain the *TiVo* standard. *Arlington* is a
24 Middle District of Pennsylvania district court opinion not
25 binding on this Court, of course. *Arlington* is a consent

1 decree case. They rely on consent decree cases and
2 confession-of-judgment cases. They are not relying on
3 cases where there was an underlying trial. There was no
4 underlying trial.

5 Now, Your Honor is fully aware, if you have a
6 consent decree, you confess judgment, then you confess
7 judgment to everything. You can't later come back and
8 say, well, my confession of judgment was only as to this
9 theory, not as to that theory. There is no underlying
10 trial to go to in *Arlington Industries*. There was in
11 *TiVo*, and Your Honor asked us for a list of cases.

12 I would commend Your Honor in particular to read
13 the *Taser* case and the *nCUBE* case, because those cases had
14 a record of evidence, and you will see the Court in those
15 cases doing what the Federal Circuit did in *TiVo* and going
16 back and looking at the evidence. They look at the
17 expert's testimony to see what was clearly stated by the
18 expert.

19 You can't do that in *Arlington* for the simple
20 reason that *Arlington* is a consent decree. The other case
21 they rely heavily on was *Merial, Ltd. v. Cipla*. That was
22 a default judgment. There was no trial. If there's no
23 trial, the entire analysis is totally different.

24 Now, Your Honor is aware that Lawson made other
25 changes to RSS. The changes that we're talking about, the

1 two-part changes to Punchout, that's not the whole story.
2 We made other changes at a time when other patent claims
3 were in this case. Claim one of the '172 patent had a --
4 had language in it about an order list.

5 THE COURT: You mean after the verdict was
6 returned --

7 MR. THOMASCH: The verdict was returned --

8 THE COURT: -- there were changes made to parts
9 or components that aren't at issue here.

10 MR. THOMASCH: Correct, but they're also within
11 RSS. That's very, very important to understanding the
12 documents that you've been shown, is that RSS was the
13 place where -- sort of the nerve center where all of these
14 changes were made. So there were changes to direct -- to
15 requisitioning technology that eliminated the use of an
16 order list as a separate holding pen, so to speak, before
17 you then looked at what was in your order list and then
18 you moved some items to requisition. They changed it so
19 that when you selected the item, you went right to the
20 requisition eliminating something that was in the patent
21 claim.

22 THE COURT: What difference does any of that
23 evidence make with respect to the accused change that is
24 involved here?

25 MR. THOMASCH: It makes -- in two very important

1 respects it makes a difference. First respect is that if
2 we had argued in this proceeding that that was a big
3 change, that change to go direct to requisition was very
4 important, and as a result of the significance of that
5 change the whole product should be considered more than
6 colorably different and we don't get to infringement, then
7 they would be correct in raising the argument that they
8 incorrectly raise in this case.

9 That order list --

10 THE COURT: Which argument are you talking about?

11 MR. THOMASCH: The issue of whether the change
12 relates to a claim element. The change to the order list
13 related to a claim element in a different patent. It's
14 not a good enough change. It doesn't relate to the claims
15 in claim 26, the elements in claim 26.

16 By the same token, we made changes to UNSPSC
17 searching. Again, that was relevant to claim 28 and 29.
18 It's not relevant to claim 26. Claim 26 has no converting
19 data step which UNSPSC, at the trial, was said to fulfill.
20 So when you look, there are changes that are not the kind
21 of change that should lead to a colorability and
22 infringement analysis.

23 THE COURT: They don't make the claim that those
24 changes do.

25 MR. THOMASCH: We don't claim that they do.

1 THE COURT: And neither do they.

2 MR. THOMASCH: Right, but we claim that the
3 changes made to Punchout and the interaction of Punchout
4 and item master do relate. They relate right onto the
5 first, second, third, and fourth elements of claim 26.

6 THE COURT: I still am having trouble
7 understanding what pertinence that point has to the
8 analysis of what is accused here. In simple terms, why
9 are you pointing me to all that?

10 MR. THOMASCH: The first reason, and I'll finish,
11 the first reason was just by way of example. I agree with
12 their argument that some changes could be made, and the
13 change could be a very significant change but having
14 nothing to do with the claim at issue, and in this
15 situation, examples of that that are not relevant are the
16 other changes we made.

17 THE COURT: But -- and if those were accused,
18 then the *Arlington* issue would be in play.

19 MR. THOMASCH: And it would be properly in play.

20 THE COURT: But they are not. Let's leave that
21 aside.

22 MR. THOMASCH: So we made other changes, and they
23 are misusing the *Arlington* theory against those other
24 changes, because those other changes do relate to the
25 claims. The second reason I want to raise it is --

1 THE COURT: Those other changes you are talking
2 about are the changes that you made that affect elements
3 one, two, three, and four in claim 26.

4 MR. THOMASCH: Right, the changes to Punchout
5 which are undisputed. The changes to Punchout
6 functionality are not in dispute, and it's those changes
7 that relate to the first four.

8 Now, the second reason I raise the issue of the
9 other changes is because the verdict that came in on
10 configuration two, three, and five affected 864 customers.
11 Everyone who had RSS was affected by that verdict. So the
12 changes that were made that went to the order list and the
13 UNSPSC was made broadly to deal with the problems for
14 everyone.

15 The changes we're dealing with are specific to
16 Punchout. So you have people out there, 700 of the 864,
17 more than 700 of them where this change has nothing to do
18 with them. If that person says, gee, the product looks
19 the same to me, they don't even have Punchout. Of course
20 it looks the same to them.

21 THE COURT: So the point of that argument is that
22 it helps put in context the comments of the customers and
23 the comments of Lawson's people about the significance vel
24 non of the changes.

25 MR. THOMASCH: Absolutely.

1 THE COURT: That's the relevance of the argument.

2 MR. THOMASCH: That is the key relevance, because
3 if you don't understand that, you could think that a
4 document that says, oh, RSS and RQC look alike, well, then
5 maybe that's someone commenting on Punchout, but only a
6 small portion of the people even had access to Punchout.

7 The ones who don't have access to it can't
8 possibly be commenting on it. They don't have it. That's
9 the overwhelming majority of the people that were affected
10 by the jury verdict.

11 THE COURT: Is there something in the record that
12 tells me whether the persons who made those comments,
13 customers who made those comments, actually what they had
14 or what they didn't have?

15 MR. THOMASCH: We will get there, because the
16 comments that have been shown to the Court are people that
17 don't have configuration three and five. The record
18 doesn't always have that evidence in it, because they
19 didn't want to put that evidence in. They wanted to
20 use --

21 THE COURT: You had a chance, though.

22 MR. THOMASCH: We did have a chance. We didn't
23 have a burden, but we had a chance. Now, the fact of the
24 matter is, the fact of the matter is the expert witnesses
25 on both sides have the names of the 150-some-odd Punchout

1 customers.

2 If you don't have Punchout, you're not a
3 configuration three or five customer. So they have the
4 full list. They did all their calculations. Everybody
5 knows who the people are. The information was available
6 to them. They know who the customers are, and it can be
7 crosschecked. There's no disputing. They don't have to
8 take our word for it. Their own expert has a list of
9 configuration three and five customers.

10 THE COURT: That's not in a record that I can
11 check.

12 MR. THOMASCH: I believe it is in the record. I
13 believe through the damages case that did come in. And we
14 would stipulate to the Court having that information. I
15 believe it's before you already, but if there's any doubt
16 about it, it's a fact, and both sides agreed on it, and
17 both side preface their damages calculation on it. We're
18 happy to have it come into evidence. More than happy.

19 I think you will find they are going to come back
20 on the rebuttal and say that we say it affects the first,
21 second, third, and fourth elements, but it doesn't because
22 we didn't rely on that, and that's a situation where --
23 that's a situation where the view of *TiVo* and Wednesday's
24 order precludes from me addressing that point. I can't
25 respond to theirs anyway, but I will tell you that our

1 position is that -- that you have changes that go directly
2 to the evidence and the theories and the issue of whether
3 or not there's infringement of element one, two, three,
4 and four of claim 26, and you do not have to do a
5 full-fledged infringement analysis before you decide if
6 something is eligible for the colorability analysis. That
7 would turn *TiVo* on its head.

8 I want to turn to colorability before my time
9 runs quickly. I want to respect the Court's limits. Our
10 colorability analysis focused on the modified feature of
11 the adjudged infringing product. We significantly limited
12 the functionality of Punchout, and our case went in, from
13 opening statement to today, comparing the differences
14 between the functionality of Punchout in RSS and in RQC.
15 And the functionality of Punchout is directly relevant to
16 the issue of infringement of configuration three and five.

17 Your Honor heard here today a comment made --
18 sort of surprised me because it came up late -- by
19 plaintiff's counsel that you don't look at the infringing
20 feature, you look at the product as a whole. And this
21 issue has been before the Court, and I don't want to
22 reargue --

23 THE COURT: I think she retrenched from that
24 statement and said you do look at the feature. You are
25 right, she did make that statement which I found to be

1 surprising, and she changed that view, I think.

2 MR. THOMASCH: In case she didn't, if I could
3 show the Court the November 8th --

4 THE COURT: It's in *TiVo*. It says what you do.

5 MR. THOMASCH: That's fine, Your Honor.

6 THE COURT: I don't think that's open to dispute.

7 MR. THOMASCH: I think that's right in *TiVo* at
8 page 882. So the change to the functionality of Punchout,
9 if you get to the issue of whether its significant,
10 there's only one answer. The change to the functionality
11 of Punchout, of course it was significant.

12 Our -- defendant's proposed findings of fact at
13 89 to 118 lay out the evidence in chapter and verse on
14 that subject. It was in this proceeding -- I'm not
15 talking about prior trial testimony that I'm banned from
16 discussing. It was this proceeding that Dr. Weaver
17 himself said that the functionality that was extracted out
18 of, blocked off of, that functionality was beneficial to
19 product users. That's our finding of fact 90 with a
20 quote.

21 It was a convenience, it was a time-saver, it
22 was, quote, probably a cost-saver, it was a real benefit,
23 and he said in this courtroom in this proceeding, it was,
24 quote, a big deal in the context of the patent.

25 It's a big deal in the context of the patent.

1 That ends the colorability analysis by all rights. You
2 can't have something that's a big deal but insignificant.
3 Big deal means it's significant. In any common use of the
4 language, that testimony is case dispositive or should be.
5 If having the functionality is a big deal, then blocking
6 someone from it and taking it away from them is a big deal
7 as well.

8 It's mathematical. It works the same way. Dr.
9 Weaver admitted as much, agreeing that from a
10 technological vantage point, it was a step back by more
11 than a decade. That's not cosmetic. That's not labeling.
12 That's a big deal if you are in the marketplace and your
13 product is suddenly ten years out of date, and we don't
14 want to have a product that's ten years out of date.

15 We have a product that's ten years out of date
16 for one reason, because there's an injunction and an
17 infringed patent claim, and we respect those. So we
18 changed our product, and we changed it to get rid of that
19 which was found infringing.

20 The inventors on a 63 patent recognize it was --
21 and this came into evidence in this case in this
22 proceeding through Dr. Goldberg, admitted testimony. The
23 inventor said it was, quote, a distinct advantage of
24 applicant's invention to be, quote, able to purchase all
25 of the selected items from all of the desired sources

1 without having to wait in the checkout line at each of
2 those stores.

3 That's what this is about. Yes, Your Honor, you
4 can still go to Punchout, buy something, go to another
5 Punchout, buy something in a different requisition. You
6 can keep opening new requisitions going through the whole
7 thing, generating a purchase order, getting it approved,
8 checking the inventory.

9 What you can't do is combine all of that and go
10 through the checkout line one time, and the applicants,
11 when they are trying to get the patent, said it's a
12 distinct advantage of our technology that you can combine
13 all sources on one requisition. You can no longer do
14 that.

15 Mr. Christopherson wanted to try to have a
16 solution that --

17 THE COURT: In your view, is that point even in
18 dispute?

19 MR. THOMASCH: No, it's not in dispute. The only
20 thing that's in dispute is what the inventor said was a
21 distinct advantage and what the expert says was a big
22 deal, the only question that's in dispute is, does a
23 distinct advantage and a big deal mean it's significant.

24 The significance bar is not so high that it isn't
25 encompassed by something that is a distinct advantage and

1 a big deal. The changes at issue undisputedly negatively
2 impacted the process at the two key points in the
3 requisition process. At the front end, it eliminated the
4 ability to see items from any and all sources at the same
5 time. That's what you used to be able to do.

6 THE COURT: What do you think about their
7 argument that is in their papers that if it's a
8 degradation, you don't even count it as part of the
9 analysis because, I suppose, because it's insignificant?

10 MR. THOMASCH: It's absolutely unsupported by the
11 law. It is a complete mistake of what was said in *TiVo*.
12 In *TiVo*, if you are having --

13 THE COURT: You are talking about the part of
14 *TiVo* which talks about we don't want to stifle innovation.

15 MR. THOMASCH: Correct. Because there's two ways
16 to handle a situation. There's three ways to handle a
17 situation when you have an infringement, and every IP
18 lawyer in this room knows it and they deal with their
19 customers on it, their clients on it if they're found
20 infringing.

21 Now, one way is just stop selling that thing
22 altogether. Another way is to eliminate that which was in
23 the product that was the basis for the infringement.
24 That's the one we chose. Another way is if we had said,
25 geez, we don't want to, that's really setting the product

1 back by a decade, let's figure out a new way to do this
2 that is going to be an advancement, an innovation, it's so
3 improved, it's so different that even though it has all
4 the functionality that the infringing product has, it's
5 more than colorably different.

6 If that's your argument, if you are arguing that
7 I kept the functionality but I changed the way I did it,
8 you better be able to argue that it's innovative, because
9 if all you did was increase a little functionality that
10 anyone who was skilled in the art would have known how to
11 do already, then that's not a significant change.

12 THE COURT: That's what they're talking about.
13 That's what the statement in *TiVo* relates to.

14 MR. THOMASCH: Correct. It doesn't apply in a
15 case where you are removing functionality. It's when you
16 are keeping the functionality that innovation matters. We
17 didn't keep functionality. The suggestion -- Dr. Weaver
18 actually said on the stand one of the most remarkable
19 things I've ever heard. He said, it doesn't matter how
20 much functionality you take away, taking away
21 functionality could never make it more than colorably
22 different.

23 Under Dr. Weaver's theory, we could stop selling
24 Requisition Center and Punchout and just sell
25 configuration one, and we'd still be infringing.

1 THE COURT: That's not changing functionality.
2 That's stopping selling the product. I'm not sure that
3 analogy helps out very much.

4 MR. THOMASCH: Well, there is no support, none
5 for the idea that removing functionality is not eligible
6 for something to be a more than colorable change. There's
7 none. They don't cite to any, and it's a mistaken
8 application of *TiVo*.

9 I said at the front end of the process you
10 changed -- you don't eliminate all ability to do
11 comparison shopping. You do significantly decrease it.
12 They show a quote from Dr. Goldberg. Dr. Goldberg said,
13 you can go to a Punchout site, and you can see -- if you
14 go to the Dell site, you can see Dell has three laptops,
15 and you can look at those three laptops and comparison
16 shop among them and pick the one you want. Absolutely
17 true.

18 You always could do that, but you used to be able
19 to say, and let's see what's over at the Apple store and
20 let's see what's over at Staples and let's see what's in
21 item master, and let me take a look at all of them at
22 once. That's comparison shopping. You can't do that.

23 THE COURT: What is the state of the record as to
24 whether in the first instance, example that you gave, you
25 can go and look at the first store, and then you can save

1 it and then open another window, and you can look at
2 what's in that store and save it, and then you can go to
3 the next store and you can save that. Then when you want
4 to retrieve the saved information, you can pull that up
5 and put it into the same purchase order. What is the
6 state of the record on that?

7 MR. THOMASCH: The state of the record is you
8 cannot do that. Now, what you can do, you can go to
9 Punchout site one, you could put something in the
10 requisition lines. Then you could close out of that. It
11 won't lose it. It will save it, but you are closed out of
12 that session.

13 THE COURT: But you can come back to that
14 session.

15 MR. THOMASCH: You can come back to it --

16 THE COURT: Or not. That's what I'm asking. Can
17 you come back to that session after you've looked at the
18 several other sessions and pick up what you saved in that
19 session and decide, well, I'm going to buy that?

20 MR. THOMASCH: Right, but what you couldn't do,
21 and what you said at the end is, and then combine. You
22 could say, I've done six different shopping sessions, I've
23 gone through the whole process, and I think number two was
24 best. You could then go back to number two, reopen that,
25 purchase that. You couldn't say, but the fourth one had a

1 different item I want, too. You can't combine them.

2 THE COURT: Because you have to put each one on a
3 different purchase order.

4 MR. THOMASCH: You have to put each one on a
5 different requisition.

6 THE COURT: Can you combine requisitions in one
7 purchase order?

8 MR. THOMASCH: You can't combine items from
9 different -- selected from different websites. Different
10 Punchout websites can't be put on the same requisition.
11 Can't do it.

12 THE COURT: I know that, but once you get
13 requisitions and you made your requisition, can you put
14 more than one requisition on a purchase order?

15 MR. THOMASCH: No, you don't put requisitions on
16 a purchase order. It's a terminology issue. If you had
17 item master -- they made a big deal out of this. If you
18 had item master, you could go to item master, and you
19 could pick items that were in stock, or you could pick
20 special items, and they might be items that you made
21 arrangements, I get a special price on these pens and a
22 special price on that typing paper. Those might come from
23 different vendors, and since you are only in item master,
24 you could combine those. You could put those on a
25 requisition, and that would lead to two purchase orders.

1 That's why we say the purchase order aspect
2 hasn't been changed. But that's only when you use item
3 master, and we can't be found liable for infringing
4 through item master for reasons we'll talk about in the
5 next half-hour slot.

6 They made a host of arguments -- as I say, I
7 think really they're all in on the *Arlington Industries*,
8 and you're not even allowed to consider it, because
9 there's just no way to work with what their inventor said
10 and what their expert said and say, the change to the
11 functionality of the feature that's been modified is not
12 significant, and they make arguments like, it didn't take
13 long to do the coding, it didn't make the product hard to
14 install, it didn't require major retraining of users, and
15 they put documents in and they questioned witnesses and
16 they --

17 THE COURT: Well, you don't really disagree --

18 MR. THOMASCH: We don't disagree with any of
19 that. That is so much irrelevance. It doesn't matter how
20 many lines of code are involved, and if there are not many
21 lines of code, it doesn't matter how long it takes you to
22 do it or whether you have great coders or terrible coders.

23 The functionality of Punchout is the feature.
24 The functionality is not in dispute. We know exactly what
25 it is. Both sides agree. I told you what it was in

1 opening statement. When Dr. Weaver took the stand, I put
2 the opening statement slide on, I read it to him, he
3 agreed. I put the second change on, I read it to him, he
4 agreed.

5 No reservation, no argument about terms, no,
6 well, if that's the way you want to say it, sir, that's
7 okay with me. Yes, yes, yes. We played it straight. We
8 told it like it is, they agreed. There's no dispute.
9 It's significant.

10 THE COURT: So, in essence, there is no need in
11 the ultimate analysis to go beyond assessing the
12 assertions made here with respect to whether the changes
13 are significant as made by ePlus and comparing them with
14 what the inventor said and with what Dr. Weaver said, and
15 if I conclude that I believe them as the finder of the
16 fact, and that, in fact, it is significant, that's the end
17 of the colorability analysis, and, of course, that's the
18 end --

19 MR. THOMASCH: That is correct.

20 THE COURT: Is that basically where you are in
21 this case?

22 MR. THOMASCH: That is exactly where we are.
23 It's not basically. It is exactly.

24 THE COURT: Yes, I used an inappropriate word.

25 MR. THOMASCH: You didn't give yourself credit

1 for the precision which you got it. You are dead on.

2 That's our position full stop.

3 Now, I do think that it was remarkably unfair to
4 have documents coming in, and we talked about this, that
5 just relate to Punchout -- I'm sorry, just relate to RSS
6 or RQC without any reference whatsoever to Punchout.
7 That's my concern. There were lots of issues about
8 whether or not the new user interface, which is the direct
9 to requisition use of requisition lines to replace a
10 shopping cart, whether that mattered, and the truth of the
11 matter is, that whole change was behind the user
12 interchange.

13 The change that was made that was relevant to the
14 patent claim was out of sight of the consumer. The
15 consumer looked at it, and it looked very similar, and so
16 everybody was happy about that. We wanted that.

17 THE COURT: That argument essentially boils down
18 to that the evidence to which they point, that there was
19 no significant change, which evidence comes out of your
20 mouth --

21 MR. THOMASCH: Right.

22 THE COURT: Really has no relation to Punchout.
23 It relates to something else.

24 MR. THOMASCH: Absolutely. And let me just in my
25 last --

1 THE COURT: And you can't use -- therefore, you
2 can't use those statements in assessing vel non whether
3 Punchout is a significant change or not.

4 MR. THOMASCH: Correct, Your Honor. I mean, for
5 goodness sake, the standard here is clear and convincing
6 evidence. It is not clear and convincing evidence that
7 the functionality of Punchout has not been changed by
8 looking at a document that makes no reference to Punchout
9 whatsoever when you know full well --

10 THE COURT: Do you think maybe you could get up
11 to another RPM or two so the court reporter will break her
12 hands?

13 MR. THOMASCH: Your Honor, it makes no sense at
14 all to suggest that you can take a document that doesn't
15 reference Punchout whatsoever but references RSS and RQC
16 when everyone in this courtroom knows we took discovery
17 for months on other changes to RSS that have nothing to do
18 with the case we just tried, and people are making
19 comments on those other changes, and they say, hey, this
20 looks great. The user interface is virtually identical,
21 it looks just the same. It's an improvement. It's a
22 superior product.

23 I mean, you've had your share of trials. That
24 must have set off a bell. Superior? What's superior?
25 Well, their documents say RQC is superior. Why? Because

1 the direct to requisition has some real benefits. We
2 would have gone into them had that been an issue in this
3 case. We would have talked about innovation, we would
4 have gone through all of that, but that's not at issue in
5 this case, but it had real benefits.

6 Secondly, the RQC application was designed to be
7 able to use mobile requisitioning so you could take your
8 iPhone, and you could be on the road, and you could go
9 right into the website and you could go out to Punchout
10 sites, and you could do that.

11 You can't do that with RSS. People said, as long
12 as we're doing those changes, let's make it better, and
13 they did, and so people say it's superior. No one said,
14 oh, it's a good thing that you have to check out from
15 every single Punchout site before you can go to the next.
16 No one said it's an advantage you can't see item master
17 and Punchout together. That's just not so.

18 So evidence that they use -- I mean one document
19 they use that actually says Punchout, Exhibit 1030, does
20 make reference to Punchout. It's a document that was sent
21 to Dale Christopherson. Dale Christopherson completely
22 disagreed with the reading they tried to give to that
23 document, but the document says -- you will recall it --
24 other than what Dale so equivalently says is lipstick on a
25 pig, there are three functional changes, one, two, three.

1 The third one is Punchout, and they talk about how there's
2 a slight difference to the process.

3 Read Exhibit 1030. A slight difference to the
4 process by which Punchout works. I would agree with that.
5 The process is not changed significantly. You still go to
6 a Punchout site, but what happens, and it says right here,
7 but when you shop at one site, you have to close out
8 before you can go to another.

9 That's the functional limitation. The functional
10 limitation was not slight, not if somebody is a
11 professional at requisitioning and used to doing
12 comparison shopping between the item master items and the
13 Punchout items and they no longer can do it. That's
14 functionality, that's lost. That has nothing to do with
15 document 1030.

16 THE COURT: What is the significance of the fact
17 or the evidence that they argue that not one of your
18 customers made any complaint about the change that was
19 made to Punchout and -- or at least it wasn't put into
20 evidence if it was. What is the significance of that?

21 MR. THOMASCH: There were multiple -- I think
22 what it shows you is that in the overall deal, you know,
23 there's a lot of things you do with this system. Punchout
24 is a small part.

25 THE COURT: But there isn't any evidence that I

1 know of about any customer complaining about the way
2 Punchout or new Punchout worked, was there?

3 MR. THOMASCH: I would disagree with Your Honor.

4 THE COURT: Where is it then?

5 MR. THOMASCH: In the answers to the webinar --
6 in the questions in the webinar, multiple customers
7 asked -- and we put this into evidence. Multiple
8 customers asked, if you get past this court proceeding,
9 will you reinstate that functionality. I hear that we can
10 no longer do X and Y. Will you change that back if you
11 win the case. And we said, this is our product now.
12 People asked about it.

13 THE COURT: That is the answer to the question?
14 I can go read answers to the webinar questions and
15 answers, and I can find where they complain?

16 MR. THOMASCH: Yes.

17 THE COURT: All right.

18 MR. THOMASCH: At the end of the day, if a
19 customer chooses not to complain, because we told the
20 customer, we told the customer that they had to make the
21 change, that they, themselves, could be infringing. We
22 said it over and over again. We say, you know, that you
23 should move swiftly to RQC, and you are at risk if you
24 don't. "At risk" was at risk of a patent infringement
25 lawsuit brought by ePlus.

1 That's through the documents, and so if a
2 customer gets that, they're not going to say, well, you
3 should leave me at risk, you should let me do that. It
4 makes sense that a customer wouldn't respond when a patent
5 claim covers it and they themselves could be sued as a
6 user. So that's very, very important.

7 There was a customer, Cleveland Central DuPage,
8 during the testimony of Keith Lohkamp. Mr. Lohkamp
9 specifically talked about complaints made to him by
10 Cleveland Central DuPage. That's there as well.

11 Documents that I would not go through because of
12 time but ask Your Honor to look at, 1027, a Mindy Klebe
13 memo about Providence Health. What do we know? We know
14 that Providence Health didn't have -- not a configuration
15 three or five customer, doesn't have Punchout. We know
16 that. It's not in dispute.

17 We have 1124 which they used today. Exact same
18 issue. Mindy Klebe said, I tested Punchout. Lawson
19 doesn't use Punchout. It's not in -- she says -- I'm
20 sorry. I spoke too fast because I'm short on time. I
21 misspoke. Mindy Klebe says in 1124, I tested RSS.
22 There's not a word about Punchout in 1124. They didn't
23 ask Mindy Klebe anything, not a word about it. She tested
24 RSS. RRSS is not accompanied by Punchout. The evidence
25 is undisputed in that regard.

1 THE COURT: "Ours" meaning what you use
2 internally.

3 MR. THOMASCH: Right.

4 THE COURT: What she tested, in other words.

5 MR. THOMASCH: Right. What she tested didn't
6 have Punchout, so her comments about the user interface
7 don't relate to it. 1066 is about Scott Hanson.
8 Goodness, Scott Hanson installs and supervises people who
9 install. He testified he didn't know anything at the time
10 of these documents about the functionality of Punchout,
11 and he still has only at the very highest level an
12 understanding of what Punchout even means.

13 He is a product installer. To use his documents
14 and to say, oh, he is head of the SWAT team, he must know,
15 no, they didn't put on any evidence that he didn't know.
16 They put him on their witness list. We brought him to
17 court, and they didn't call him in the colorability phase.

18 If they wanted to make that argument, they should
19 have put him on the stand. When he got on the stand, he
20 said, I don't know about this, that's not my job. I don't
21 have anything to do with it.

22 Document 1110 is a Dean Hager to Langer about no
23 training. Again, has nothing to do with Punchout. 1266
24 is Dean Hager about Summa Health Care. Summa Health Care
25 was not even a customer. They didn't have Punchout. He

1 said, I wrote them about the concerns you raised in the
2 conversation, and when he testified at the second
3 deposition, they asked him, and he said it had nothing to
4 do with Punchout.

5 They are using documents that don't reference
6 Punchout, that reference the user interface that go to the
7 other changes, and they are trying to use them against us
8 in this case, and they have a clear and convincing
9 standard of proof that is wrong.

10 The last two I would mention would be from
11 plaintiff's opening demonstrative. They referenced
12 Crandall, and they referenced Children's Health. Those
13 are not -- Crandall is not a customer at all, and there's
14 no evidence Crandall has any exposure to Punchout.

15 Children's Hospital is not a configuration three
16 or five customer. The quote that they use, RQC looks like
17 RSS. Well, of course it looks like RSS if you don't have
18 Punchout. It's not going to look different anyway. It's
19 software code. The user interface is what you see. The
20 user interface, if you didn't have Punchout before and you
21 don't have Punchout now, there's no difference. It
22 doesn't have Punchout on it. It looks identical. That
23 doesn't mean that the functionality of Punchout is somehow
24 identical. It's not.

25 You can't seriously argue that it is not a

1 colorable change to the functionality of Punchout. Their
2 argument, and their only argument, is, don't worry about
3 the functionality of Punchout, because Mr. Thomasch may
4 say that it relates to items one, two, three, and four,
5 but we didn't need any of that fancy functionality in
6 order to infringe one, two, three, and four, so that
7 played no part in the last case.

8 That argument is wrong. These were functional,
9 significant functional changes, and the best evidence of
10 it comes out of their mouth, their inventors, their
11 expert. It was a big deal, it was a distinct advantage,
12 and we blocked it, and we took it out, and there are
13 documents in this case that show that they did it because
14 of what Dr. Weaver testified to. I won't go there in this
15 argument, but our briefs and our findings of fact make it
16 clear. Thank you, Your Honor.

17 THE COURT: Thank you. Ms. Albert, how do you
18 reconcile the testimony of the inventor, the testimony of
19 Dr. Weaver, and the fact that degradation of the product
20 which seems to me -- the utility of the product, which
21 seems to me to be undisputed with your insignificant
22 argument? How can I come to that conclusion, the
23 conclusion you want me to come to in the face of that
24 evidence that Mr. Thomasch pointed to?

25 MS. ALBERT: Of course, Dr. Weaver said during

1 his testimony that, yes, it's a big deal to be able to
2 combine line items associated with multiple sources on a
3 single requisition, but then he clarified that it's not
4 required by claim 26. Can I have slide 20, please.

5 Claim 26, the fourth element has building a
6 requisition using data relating to selected matching items
7 and their associated source or sources. So claim 26
8 doesn't require that you have multiple line items
9 associated with multiple sources on a single requisition.

10 Yes, that's one circumstance that satisfies that
11 claim requirement, but there are additional circumstances
12 that also satisfy that claim requirement, and that's what
13 Dr. Weaver said when he was testifying at the hearing.

14 THE COURT: At this hearing.

15 MS. ALBERT: This hearing. And I just want to
16 clarify, Lawson counsel referred repeatedly to changes
17 made to Punchout. There were no changes made to the
18 Punchout application. Mr. Christopherson confirmed that
19 there were no changes made to the Punchout application.
20 Lawson's own documents confirmed there were no changes
21 made to the Punchout application, and I would refer the
22 Court to plaintiff's proposed findings of fact 37 through
23 39 and 50.

24 So, therefore, the facts that numerous documents
25 refer to the only change that's made as a change to the

1 user interface, those documents are absolutely correct,
2 because RSS and RQC are just that. They are the user
3 interface for the entire system. So of course the Lawson
4 employees are referring to the only change made as a
5 change to the user interface, because RQC and RSS are the
6 user interface.

7 I want to address the comment about the fact that
8 customers that commented may not have had Punchout;
9 however, if we go to slide ten, which were the customers'
10 comments, those were comments that customers made during
11 the course of Lawson's demonstration of RQC which also
12 included a demonstration of RQC with Punchout.

13 So their comments were addressed to the entirety
14 of Lawson's demonstration during that webinar which
15 involved a demonstration of Punchout as well, and I would
16 refer to the fact that Lawson did not lose a single
17 customer because of the transition of RSS to RQC, and that
18 was confirmed by Mr. Lohkamp's testimony which is on slide
19 14.

20 Now, with respect to this big deal feature about
21 being able to include multiple line items associated with
22 multiple sources on a single requisition, that capability
23 does still exist in configurations three and five.
24 Indeed, Lawson's own documents confirm that the capability
25 still exists. If you would refer to slide six, that

1 statement on slide six comes from Lawson's Requisition
2 Center and Procurement Punchout brochure, and in that
3 brochure that deals with RQC and Punchout, Lawson confirms
4 that you can still consolidate multiple types of products
5 and services into a single requisition and that the system
6 will then generate multiple purchase orders from that
7 requisition.

8 Now, Mr. Thomasch mentioned that Lawson contends
9 that the modification relates to elements one, two, three,
10 and four of claim 26. I mean, this is the first time
11 we've heard this. It was not in Lawson's post-hearing
12 brief on either colorability or infringement, but I would
13 just mention that this theory of Lawson's relies upon a
14 new claim construction, because the Court has already
15 construed the selecting product catalogs to search and
16 searching among the selected product catalogs claim
17 elements to be satisfied by a selection of only one
18 catalog from the at least two product catalogs included in
19 the system.

20 So, again, *TiVo* says that you cannot -- you need
21 to rely on the claim constructions that were used in the
22 underlying trial --

23 THE COURT: Are you saying that his contention
24 that the modifications affect elements one, two, three,
25 and four depend upon a new claim construction as to what?

1 MR. THOMASCH: Well --

2 THE COURT: As to what element?

3 MR. THOMASCH: It appears that --

4 THE COURT: Excuse me. I said claims one, two,
5 three, and four. I mean elements one, two, three, and
6 four of claim 26.

7 MS. ALBERT: It would appear that --

8 THE COURT: What new claim construction are you
9 talking about?

10 MS. ALBERT: I'm referring to the Court's claim
11 construction relating to elements two and three, the
12 selecting and searching claim elements. As to those, the
13 Court already rejected Lawson's prior contention that
14 those claim elements would require the selection of
15 multiple catalogs to be searched.

16 THE COURT: So they are retrenching back to the
17 claim construction argument on element two and three in
18 order to make the argument that the modification affects
19 elements one, two, three, and four of claim 26; is that
20 what you are saying?

21 MS. ALBERT: That would appear to be the case.
22 Additionally, element four, by its express terms, allows a
23 requisition having line items associated with either a
24 single source or multiple sources.

25 THE COURT: What is the significance of that

1 statement in responding to the fact that the modification
2 affects element four of claim 26?

3 MS. ALBERT: It's irrelevant if the system no
4 longer allows you to combine an item selected from an item
5 master catalog with an item selected from a Punchout
6 catalog on a single requisition. That's not required.

7 THE COURT: I see.

8 MS. ALBERT: Nor is the combination of an item
9 selected from one Punchout site with an item selected from
10 another Punchout site required by element four.

11 THE COURT: I see.

12 MS. ALBERT: Now, as far as comparison shopping
13 goes, of course the system still enables you to go to a
14 single multi-vendor Punchout site and compare among the
15 various items offered by the multiple vendors --

16 THE COURT: If you have a Punchout site that has
17 multiple vendors itself in it, you can do that.

18 MS. ALBERT: You could search among those
19 multiple catalogs in a single Punchout session, select
20 items from multiple different catalogs associated with
21 multiple vendors, bring those back to the Lawson user
22 interface, build a requisition, and generate multiple
23 purchase orders --

24 THE COURT: And that infringes?

25 MS. ALBERT: Yes. Additionally, you can select

1 to search among the multiple product catalogs stored in
2 the item master and compare the items offered by different
3 vendors with respect to those catalogs, and as Lawson's
4 own documents and their witnesses confirm, the system can
5 build a requisition having multiple line items associated
6 with multiple vendors and generate multiple purchase
7 orders from a single shopping session within the item
8 master.

9 THE COURT: You are referring to slide six.

10 MS. ALBERT: Slide six, yes. And finally,
11 counsel mentioned the *Taser* and *nCUBE* cases. Those cases
12 are distinguishable because the feature that was relied
13 upon for infringement was entirely removed from the newly
14 accused systems. That is not the case here.

15 THE COURT: All right.

16 MS. ALBERT: Thank you, Your Honor.

17 THE COURT: We'll next deal with infringement,
18 but before we do that, we'll take a 15-minute recess.

19
20 (Recess taken.)
21

22 THE COURT: I may have to interrupt this session
23 and take a quick phone call, but if I do, you just stay in
24 place, and we'll be combat ready as soon as I'm finished
25 with that, and I apologize in advance.

1 MS. ALBERT: May it please the Court, ePlus
2 established by clear and convincing evidence that
3 configurations three and five with RQC continue to
4 infringe claim 26. The clear and convincing evidence
5 presented included demonstrations with an actual Lawson
6 system by Dr. Weaver, Lawson's own documents, testimony of
7 Lawson's own witnesses.

8 Indeed, Lawson did not proffer any witnesses to
9 rebut ePlus's evidence concerning infringement of claim 26
10 using RQC configurations three and five.

11 Slide 19 presents a summary of the infringement
12 evidence. Clear and convincing evidence established that
13 RQC configuration five with item master and EDI is used to
14 infringe claim 26. Clear and convincing evidence
15 established that RQC configurations three and five with
16 Punchout are used to infringe claim 26 and that RQC
17 configurations three and five, when connected to
18 multi-vendor Punchout sites, are used to infringe claim
19 26.

20 THE COURT: You make the statement in your brief
21 that they offer no infringement defense. What do you see
22 that the defendant offered by way of evidence opposing the
23 infringement?

24 MS. ALBERT: I didn't see any non-infringement
25 evidence presented with respect to the RQC configurations.

1 THE COURT: Do you consider that what they asked
2 on cross-examination of your witnesses to be considered as
3 evidence of non-infringement from their side assuming that
4 it qualifies -- in other words, suppose that the evidence
5 came out on cross-examination of Dr. Weaver that
6 demonstrated non-infringement. That could be considered.

7 MS. ALBERT: Yes, correct.

8 THE COURT: But other than cross-examination of
9 witnesses, they offered none; is that your point?

10 MS. ALBERT: That's my point. Now, slide 20
11 shows all of the elements of claim 26. As we know, claim
12 26 is a method claim comprising six steps, and clear and
13 convincing evidence established that configurations three
14 and five with RQC perform each and every step.

15 Now, my next slides are similar to those used in
16 opening but now include citations to record evidence in
17 support of ePlus's contentions for the Court's
18 convenience.

19 The evidence showed that the step of maintaining
20 at least two product catalogs on a database containing
21 data relating to items associated with the respective
22 sources is satisfied by RQC configurations three and five
23 in any one of four ways: First, an item master containing
24 at least two product catalogs; second, connections to at
25 least two Punchout sites; or, three, connection to a

1 single Punchout site that hosts multiple vendor catalogs;
2 or four, the element is also satisfied if the system has
3 any combination of these.

4 For example, the system could have an item master
5 containing a catalog and a connection to one Punchout
6 site, and that would satisfy the requirements for at least
7 two product catalogs.

8 The modification made to RSS does not prevent a
9 user from maintaining at least two product catalogs in any
10 of these ways, and we saw that at the trial.

11 With respect to the second and third elements of
12 claim 26, the evidence showed that the sole modification
13 made to RSS does not prevent a user from selecting the
14 product catalogs to search and searching for matching
15 items among the selected product catalogs as required by
16 the second and third steps of claim 26.

17 As we discussed earlier, the Court has already
18 held that the proper construction for selecting the
19 product catalogs and searching among the selected product
20 catalogs must allow for selecting and searching of only
21 one catalog, and in doing so, the Court specifically
22 rejected Lawson's claim construction argument that a user
23 must select two or more catalogs to search.

24 THE COURT: In making these statements under the
25 heading Satisfied By and the citations that you make at

1 the end of the numbered instances there, are you saying
2 that those citations establish that the modification
3 doesn't preclude any or all of those? In other words,
4 where do I draw the proof, or are you saying that the
5 cited authority simply stands for the proposition that the
6 claim can be satisfied if item master does this, this,
7 this, or this? Or multiple -- or if any of these things
8 happen.

9 MS. ALBERT: The proof in those proposed findings
10 of fact was the evidence that was adduced at trial which
11 included --

12 THE COURT: I guess what I'm getting at, is it
13 the proof that the element is satisfied if one of these
14 things happen, or is it the proof -- is it proof that, in
15 your view, the modification didn't preclude any of those
16 things which are satisfying --

17 MS. ALBERT: It's proof that the system, as
18 modified, still -- a user can still select one or more of
19 the catalogs in the item master, and that was
20 demonstrated, for example, by Dr. Weaver in a product
21 demonstration and also by testimony from Lawson witnesses,
22 and additionally, the evidence showed that the system as
23 modified, you know, with the RQC module still allows a
24 user to select, to search a Punchout catalog, or the
25 system as modified still enables a user to select and

1 search one or more catalogs at a multi-vendor Punchout
2 site.

3 With respect to the fourth element of claim 26,
4 the evidence also established that notwithstanding the
5 modification made to RSS to form RQC, the fourth element
6 of claim 26 is satisfied by configurations three and five
7 that require building a requisition using data relating to
8 selected matching items and their associated source or
9 sources.

10 The language in the claim clearly states that the
11 element is satisfied by building a requisition using
12 associated -- using items associated with one source or is
13 satisfied by building a requisition having items
14 associated with more than one source. And the evidence at
15 the hearing demonstrated that RQC -- requisitions built
16 using configurations three and five with RQC can use data
17 relating to selected matching items associated with a
18 single source or multiple sources from one or more
19 catalogs in the item master, a single source from a single
20 vendor Punchout site, or a single source or multiple
21 sources from one or more catalogs within a multi-vendor
22 Punchout site.

23 With respect to the fifth element of claim 26,
24 the modification that was made to RSS has no bearing on
25 the capability of configurations three and five to process

1 the requisition to generate one or more purchase orders
2 for the selected matching items. Again, this element, by
3 its plain terms, is satisfied by processing the
4 requisition to generate either one purchase order for the
5 selected matching items or multiple purchase orders, and
6 requisitions built using configurations three and five
7 with RQC can, indeed, be used to generate one purchase
8 order for selected matching items associated with a single
9 source or more than one purchase order for selecting
10 matching items associated with multiple sources.

11 For example, we saw in Dr. Weaver's first
12 demonstration a requisition having multiple line items
13 associated with multiple sources. That was processed to
14 generate two purchase orders, and that demonstration was
15 found at Plaintiff's Exhibit 1135 and 1135-A.

16 We saw in Dr. Weaver's second demonstration a
17 requisition having a single line item associated with a
18 single source. That was processed to generate a single
19 purchase order, and that was Plaintiff's Exhibit 1134 and
20 1134-A, and both circumstances satisfy the requirements of
21 claim 26.

22 We also had evidence in the form of admissions of
23 Lawson's own witnesses and in its documents that the RQC
24 configurations three and five can, indeed, process a
25 requisition to generate either one or multiple purchase

1 orders for selected matching items.

2 With respect to the sixth element of claim 26,
3 Lawson does not even contend that the modification that
4 was made to RSS has any impact whatsoever on the sixth
5 element of claim 26 that requires determining whether a
6 selected matching item is available in inventory. This
7 claim element is satisfied when a user of configurations
8 three or five checks whether an item is available in
9 inventory either through querying the Punchout vendor
10 inventory database, or with respect to configuration five,
11 through an EDI purchase order acknowledgment report that
12 confirms whether or not an ordered item is available in
13 the vendor's inventory.

14 Besides the demonstrations performed by Dr.
15 Weaver using the Lawson system produced in discovery,
16 Lawson's own witnesses confirmed the infringing
17 capabilities of RQC configurations three and five. For
18 example, there was testimony from Mr. Lohkamp confirming
19 many of the infringing capabilities of the RQC
20 configurations. He testified here in the transcript, page
21 532 and 534, he confirmed that the RQC configurations
22 three and five continue to have the capability to maintain
23 multiple catalogs in item master, that the user can select
24 and search among those item master catalogs, that you can
25 build a multiline requisition with items associated with

1 multiple sources.

2 He says here, as mentioned here, you can have an
3 item associated with vendor A and an item associated with
4 vendor B and place both of those items in a single
5 requisition, and when you click release, the purchase
6 order module will generate two purchase orders, one to
7 vendor A and one to vendor B.

8 THE COURT: The first question relates to element
9 one.

10 MS. ALBERT: Right.

11 THE COURT: What does the second question relate
12 to?

13 MS. ALBERT: That relates to searching the
14 catalogs and then --

15 THE COURT: Which elements; two and three?

16 MS. ALBERT: Two, three, and somewhat to four,
17 because once you get the search results, you can select
18 multiple items for inclusion in a requisition.

19 THE COURT: And the last question on that slide,
20 element what?

21 MS. ALBERT: That relates to four and five,
22 because it talks about the facts that you can have an item
23 master item associated with vendor A and an item master
24 item associated with vendor B and place both of those
25 items in a single requisition. That's element four.

1 Then the last part of that question talks about
2 processing the requisition to generate two purchase
3 orders, one to vendor A and one to vendor B. That relates
4 to element five.

5 THE COURT: All right.

6 MS. ALBERT: Now, Mr. Lohkamp also confirmed the
7 infringing capabilities of the RQC configurations when
8 using Punchout. He testified here at pages 534 and 535 of
9 the transcript that a user of a Lawson procurement system
10 that includes RQC and Punchout can have multiple Punchout
11 sites configured to the system. So that relates to the
12 first element of claim 26.

13 Then on the next slide, slide 28, Mr. Lohkamp
14 confirmed that a user of RQC configurations three and five
15 can select items from multiple different vendors at a
16 multi-vendor Punchout site such as SciQuest, and those
17 items can be returned to the user interface of the Lawson
18 system where the Lawson system requisition module will
19 build a multiline requisition with items associated with
20 multiple sources, here vendor A and vendor B.

21 He also confirmed --

22 THE COURT: The first question relates to what
23 element?

24 MS. ALBERT: The first question relates to
25 searching and selecting items from multiple different

1 vendor catalogs while in a single Punchout shopping
2 session at the SciQuest site. So that's the second,
3 third, and fourth elements of claim 26.

4 THE COURT: All right.

5 MS. ALBERT: Then the last question on that page
6 refers to the fifth element of claim 26 where the system
7 processes the multiline requisition that has line items
8 associated with multiple sources and generates multiple
9 purchase orders from a single requisition.

10 Also, if I can go back to slide nine, Mr.
11 Lohkamp's --

12 THE COURT: Slide nine.

13 MS. ALBERT: I just wanted to say that Mr.
14 Lohkamp's testimony confirms what Lawson previously told
15 its customer Cleveland Clinic in Plaintiff's Exhibit 1022,
16 that with regard to Punchout and SciQuest, RQC functions
17 as RSS did. We support one Punchout vendor website per
18 connection, and when you conduct a shopping session at
19 SciQuest, you can come back with multiple vendors on the
20 same requisition with a single Punchout session.

21 THE COURT: All right.

22 MS. ALBERT: So there was also testimony
23 presented at the hearing that Lawson itself uses
24 configurations three and five to infringe claim 26. Both
25 Mr. Christopherson and Mr. Lohkamp confirmed that Lawson

1 uses systems with RQC and Punchout to perform customer
2 demonstrations.

3 On slide 29, I present here Mr. Christopherson's
4 testimony that confirms that when Lawson conducts customer
5 demonstrations of the RQC configurations with Punchout, it
6 performs each and every element of claim 26. Here I've
7 highlighted within the slide the selecting claim element,
8 the search claim element, the checking availability of
9 items claim element, generating the requisition, and
10 generating the purchase order. So Lawson itself does,
11 indeed, use the systems having RQC and Punchout.

12 And Mr. Lohkamp also testified that Lawson
13 demonstrates systems with RQC and Punchout to its
14 customers.

15 Lawson's own documents also confirm that Lawson
16 uses the RQC systems to perform procurement for its own
17 business operations, and we have here --

18 THE COURT: Do you take all of this evidence to
19 mean that Lawson uses this -- uses it in their own
20 operations or that they used it only to make sure and
21 satisfy themselves that it did work so they could tell
22 their customers it did work?

23 MS. ALBERT: Lawson uses it in its own operations
24 to market, offer for sale, and sell the infringing
25 configurations three and five with RQC and Punchout to its

1 customers.

2 THE COURT: That's to show that it works. I'm
3 asking you a different question. Is there any evidence
4 that they actually use it, the infringing configurations,
5 in their own business?

6 MS. ALBERT: The evidence on slide 30 is evidence
7 that came into the record that Lawson uses the RQC
8 configurations in its own business to perform procurement
9 operations.

10 THE COURT: All right.

11 MS. ALBERT: The evidence also confirmed that
12 Lawson's customers use RQC configurations three and five
13 to perform the steps of claim 26, and as you recall, the
14 Federal Circuit held that there remains no serious dispute
15 that Lawson's customers infringe claim 26.

16 Given that the modules that perform the claim
17 functionality remain unchanged within configurations three
18 and five, the Federal Circuit's holding remains true
19 today. Of course, customers must either be continuing to
20 use the RSS infringing configurations three and five or
21 using the RQC configurations three and five. There is no
22 third option, and we know from the evidence at the hearing
23 that Lawson did not lose a single customer due to the
24 transition to RQC.

25 So, I mean, we have to conclude from that that

1 the customers are either using the infringing RSS
2 configurations three and five or they are using the RQC
3 configurations three and five.

4 Indeed, Mr. Christopherson did actually confirm
5 that Lawson customers use configurations with RQC and
6 Punchout to perform each step of claim 26. He confirmed
7 over 100 customers are using RQC configurations and that
8 they use those systems to select catalogs to search,
9 search the selected catalogs, build requisitions from
10 selected matching items, and generate purchase orders from
11 those requisitions. And this testimony is found on slide
12 32.

13 The evidence also showed that Lawson has realized
14 millions of dollars in licensing and maintenance revenues
15 attributed to the accused RQC configurations three and
16 five. So one would have to deduce from that that the
17 customers are, indeed, using the RQC configurations three
18 and five given that they've paid Lawson millions of
19 dollars for such use.

20 The evidence shows that Lawson induced its
21 customers to use the RQC configurations in a variety of
22 different ways. It offered RQC free of charge for
23 download from its support website. It provided an RQC
24 SWAT team to assist its customers with the installation of
25 RQC.

1 THE COURT: There isn't any dispute that
2 customers use RQC, do they?

3 MS. ALBERT: Well, in Lawson's post-hearing
4 brief, they say variously at different portions of the
5 brief that there was no evidence that Lawson's customers
6 used the RQC configurations. Then they say at other
7 portions of the brief that there's no evidence that
8 Lawson's customers are continuing to use the RSS
9 infringing configurations; rather, they are using the RQC
10 configurations.

11 So they make contradictory contentions in their
12 post-hearing brief, but we believe the clear and
13 convincing evidence adduced at the hearing did, in fact,
14 establish that the customers are using configuration --
15 RQC configurations three and five as established by
16 Lawson's own admissions.

17 Lawson induces the customers to use the RQC
18 configurations --

19 THE COURT: Do they -- is the evidence they get
20 paid for that?

21 MS. ALBERT: They've been paid over \$20 million
22 for licensing RQC and providing maintenance and support
23 services for those systems.

24 THE COURT: So are we to infer from that that
25 because somebody pays -- there's \$20 million worth of

1 payments to get the right to use RQC and have it
2 maintained, installed, serviced, et cetera, that they, in
3 fact, are using RQC; is that what you are saying?

4 MS. ALBERT: Yes. But, additionally, we have
5 direct evidence that they were using it from the mouths of
6 Lawson's own witnesses. All of the activities mentioned
7 on slide 33 were previously held by the Federal Circuit to
8 constitute evidence of Lawson's inducement. Lawson
9 continues these inducing activities to this day. There is
10 no real dispute about these activities.

11 Now, Lawson is in contempt of the Court's
12 injunction not only because the configurations with RQC
13 are being used to infringe claim 26 but also because
14 Lawson has encouraged and assisted its customers with use
15 of the original infringing software configurations with
16 RSS.

17 And as the Court may recall, the express terms of
18 the injunction prohibit Lawson from aiding and abetting,
19 actively inducing, or in any way contributing to the
20 making, use of the infringing products with RSS.

21 Indeed, Lawson specifically designed RQC so that
22 it could be run in parallel with RSS. Lawson told its
23 customers during the RQC webinar that RQC is designed to
24 work in an environment where multiple users are using RSS
25 and others are using RQC at the same time, and that is

1 found in Plaintiff's Exhibit 1105.

2 Lawson provided instruction to its customers for
3 how to change the bookmarks so that they could run RSS in
4 parallel with RQC, and Mr. Lohkamp testified that the
5 customers continue to have this capability today.

6 Now, the injunction also precludes Lawson from
7 provision of any instruction, encouragement, installation,
8 implementation, maintenance, or support for any of the
9 infringing products and services. Both Mr. Lohkamp and
10 Mr. Hanson testified that in the course of Lawson's RQC
11 customer webinars, Lawson provided instruction to its
12 customers to enable them to continue to run RSS, and the
13 evidence at the hearing also showed that Lawson provided
14 maintenance and support services to customers on systems
15 that had RSS --

16 THE COURT: Excuse me, go ahead.

17 MS. ALBERT: But Lawson continued to provide
18 maintenance and support services to customers on systems
19 with RSS after the date of the entry of the injunction.

20 THE COURT: Isn't their position that that was
21 only for a short period of time and a few isolated
22 instances and generally they did comply with the
23 injunction because they gave the customers the right to
24 download the RQC, and they can't do anything else about
25 that? Isn't that their position?

1 MS. ALBERT: That is their position.

2 THE COURT: What's wrong with that? If they gave
3 them a download, how can they control -- what is Lawson
4 supposed to do in order to comply, in your judgment? Tell
5 them you can't use RSS anymore?

6 MS. ALBERT: They could have disabled the RSS
7 functionality upon the installation of RQC.

8 THE COURT: In the systems then being operated by
9 the customers.

10 MS. ALBERT: Correct.

11 THE COURT: What evidence is there that they
12 could have done that?

13 MS. ALBERT: The evidence in the record is that
14 they didn't even try to do that.

15 THE COURT: But is there any evidence that you
16 can do it? In other words, I take it from what you are
17 saying you could have built a program for RQC such that
18 when you installed it, RSS would shut down.

19 MS. ALBERT: Right.

20 THE COURT: Is there any evidence that that could
21 have been done?

22 MS. ALBERT: No, there's no evidence in the
23 record to that effect.

24 THE COURT: There's evidence they didn't do that.

25 MS. ALBERT: Right. And there's evidence that

1 they specifically designed RQC so that it could run in
2 parallel with RSS and the customers would not have to
3 uninstall RSS.

4 THE COURT: Is your argument on this point just
5 essentially that this is just simply willful blindness,
6 that essentially what they did is enable the systems to
7 operate in an infringing manner, put a little bit of
8 information out, make it look like that, in fact, there
9 was no -- that there's an alternate system out there, but
10 they knew good and well people were going to run it
11 because people liked it, and they just shut their eyes to
12 the whole situation? Is that your argument?

13 MS. ALBERT: That is our argument, but not only
14 did they shut their eyes to whether the customers
15 continued to use RSS, but they also expressly instructed
16 them and encouraged them how they could continue to use
17 RSS.

18 THE COURT: Right, but the evidence of that is
19 that it occurred in probably, what, ten instances out of a
20 hundred customers?

21 MS. ALBERT: Well, they presented the instruction
22 for how the systems could run in parallel at the RQC
23 customer webinar that was attended by over 800 customers.

24 THE COURT: So they told everybody.

25 MS. ALBERT: Correct.

1 THE COURT: What is this; sort of a wink/wink
2 nod/nod kind of compliance?

3 MS. ALBERT: That seems to be what it is, or bury
4 your head in the sand.

5 THE COURT: That's your theory.

6 MS. ALBERT: That is our theory.

7 THE COURT: Bury your head in the sand or
8 wink/wink nod/nod.

9 MS. ALBERT: All they checked on was whether the
10 customer downloaded the RQC, and a download does nothing
11 as Mr. Lohkamp and Mr. Hanson both testified.

12 THE COURT: And they knew it did nothing.

13 MS. ALBERT: They knew it did nothing. You have
14 to actually install it before it would be operational.

15 THE COURT: Even once you do install it, you can
16 still run RSS.

17 MS. ALBERT: Correct.

18 THE COURT: Did they ever tell the customers, you
19 have to stop running RSS now?

20 MS. ALBERT: No. They actually expressly told
21 them they could continue to run RSS.

22 THE COURT: I thought somebody said you are
23 running a heck of a risk if you keep running RSS.

24 MS. ALBERT: I think there were a few statements
25 that indicated that they told the customers they would be

1 at risk if they continued to run RSS, but then they
2 continued to provide instruction for how they could do so.

3 So in conclusion, the clear and convincing
4 un rebutted evidence established that RQC configurations
5 three and five are used to infringe claim 26. Lawson
6 itself uses RQC configurations three and five to infringe
7 claim 26, and Lawson's customers also use the
8 configurations to infringe claim 26. The clear and
9 convincing evidence also established that Lawson induces
10 its customers' use of the RQC configurations three and
11 five.

12 Therefore, Lawson is in contempt of the Court's
13 injunction based on its activities with respect to the RQC
14 configurations. Lawson is also in contempt of the Court's
15 injunction based on its aiding and abetting of its
16 customers' ongoing use of the infringing RSS
17 configurations.

18 For all of these reasons, ePlus requests that the
19 Court find Lawson in contempt. Thank you.

20 MR. THOMASCH: Your Honor, there are serious
21 charges here, and a lot has been made that is simply not
22 accurate. I want to start, because I just am offended by
23 it. You asked counsel very specifically, does Lawson use
24 infringing configurations in its own business. You asked
25 that question. The first answer was a deflection. It

1 was, they use it to sell and demonstrate to their
2 customers, and you went back and you said, does Lawson use
3 infringing configurations in its own business, and the
4 answer you got was that they use RQC in their own
5 business. Yes, they do. They don't use infringing
6 configurations.

7 THE COURT: But basically isn't that an answer
8 that because she thinks RQC infringes, they are using
9 infringing configurations?

10 MR. THOMASCH: No. The infringing configuration
11 is defined in the contempt order. There's no dispute
12 between the parties as to what it is. It is a series of
13 modules. One of those modules is Punchout. Punchout is
14 in configuration three, Punchout is in configuration five.

15 Let's just start with the fact that if you don't
16 have the Punchout module, you are not possessing an
17 infringing configuration. Full stop. There are not two
18 sides to that issue. There is one side to that issue.

19 THE COURT: Are you saying then that the record
20 establishes that Lawson does not use Punchout in its own
21 operations?

22 MR. THOMASCH: I am saying exactly that, and I
23 would direct the Court to defendant's proposed finding of
24 fact 320. The evidence was in, it was uncontradicted, and
25 Your Honor deserved a straightforward answer. It's not an

1 infringing configuration if it doesn't have Punchout. We
2 don't use Punchout in our own business. That fact is not
3 in dispute.

4 THE COURT: What finding of fact are you saying?

5 MR. THOMASCH: 320, Your Honor. Defendant's
6 proposed finding of fact 320 was a very carefully phrased
7 series of answers to avoid answering the question Your
8 Honor asked.

9 Now, the infringement argument, as Your Honor
10 understands, is one that I don't believe we ever get to.
11 I don't believe the Court ultimately needs to write a
12 decision on infringement. I don't think it's appropriate
13 to have argument on infringement, and my hands are tied in
14 trying to do so given that we have a fundamentally
15 significantly changed product that doesn't fit into the
16 infringement analysis that was used at the first trial.

17 But I have limitations on what I can say, and I'm
18 going to try to make a couple of specific points within
19 Your Honor's framework that you set out in Wednesday's
20 order, and then I'm going to move over to RSS, but I want
21 to deal with RQC first because it's important.

22 Dr. Weaver was their evidence of infringement.
23 Dr. Weaver put forth two modes of alleged infringement.
24 They were separate, they were distinct, and the
25 distinction is important because there are two

1 configurations at issue.

2 His first mode of infringement was the item
3 master EDI route. He did a demonstration that showed how
4 you can go through the first five steps, making a
5 selection of items from the item master, and then he
6 testified that you could then add on a confirming
7 inventory step using EDI.

8 He then did a second infringement demonstration.
9 He used Punchout only. He went to one Punchout site,
10 Staples. Cross-examination made clear that which was a
11 little vague on direct which was these were entirely
12 separate examples. There is no overlapping. You don't
13 select in one example and search in the other. You don't
14 build a requisition in one with item master and then send
15 out a purchase order with Punchout.

16 It doesn't work that way, because the new
17 configuration, of course, does not allow you to combine
18 item master and Punchout. So they have to be distinct.
19 That's the whole point of the first of the two changes, is
20 you have to have them distinct.

21 Now, why is that important? ePlus argues
22 collectively as to configurations three and five in its
23 infringement analysis, but that's wrong because three and
24 five are different in how they work. If you use item
25 master, you can only perform the confirming inventory

1 check through EDI. So item master and EDI are married up
2 together.

3 If you are using Punchout, then Punchout can
4 operate on its own to both allow you to -- in Punchout you
5 can actually select a catalog, and you can build a
6 requisition, and you can go forward and check inventory
7 with Punchout, but it's different. Item master doesn't
8 allow that, but item master married to EDI is a different
9 story.

10 When they questioned our witnesses, they didn't
11 distinguish between which route are you talking about, so,
12 for instance, in slide 26 that you were just shown, Mr.
13 Lohkamp is asked about item master items A and B and how
14 you could put them together on the same requisition. They
15 are correct. Mr. Lohkamp answered the questions. He
16 didn't fight. He answered correct, yes. He gave the
17 answers.

18 But what are the questions? The questions asked
19 on slide 26, if a user using the S3 procurement system
20 including RQC searches the item master, that user can
21 select multiple items for inclusion in a requisition that
22 can be purchased from multiple different vendors; correct?
23 And he said, yes.

24 Now, Your Honor, you have to go to the claim 26.
25 Claim 26 doesn't ask for a selection of items. The second

1 claim element in claim 26 is, quote, selecting the product
2 catalogs to search. You cannot do that in item master.
3 You search items in item master. You don't search
4 catalogs in item master.

5 They asked Mr. Lohkamp about item master, and
6 they didn't use the word catalog. They used the word
7 catalog when they spoke to Mr. Christopherson. They did
8 that in slide 32 which references catalogs but doesn't
9 reference checking inventory. There's two ways to do it,
10 and there's six claim elements, and they have to find that
11 somebody did it one way, and they hit all six of those
12 claim elements, and they don't do that, but item master
13 and EDI, that can only be done in configuration five. You
14 couldn't do that in configuration three at all.

15 Dr. Weaver made no -- he admitted that. He had
16 to admit that. The transcript at 766, he conceded that if
17 you are using configuration three, the only possible way
18 to infringe is with Punchout, and he said only
19 configuration five is claimed to be infringed without
20 Punchout.

21 But configuration five does not allow for
22 infringement by item master and EDI. It is absolutely
23 clear, there is no evidence to the contrary. Item master
24 does not allow the selection of discrete catalogs for
25 searching as element two. Dr. Weaver tried to slide

1 through that. You asked him when he got on the stand, it
2 would be helpful if you'd tell me, you know, when you are
3 reaching each one of those steps, and he said, you know,
4 it will be easier, I think, if at the end I summarize it
5 all.

6 So there was never a time when he said, I'm now
7 performing the second element, because he never did
8 perform the second element. And in the end, he said,
9 well, I did it all together, did two and three together by
10 using UNSPSC searching.

11 UNSPSC searching searches for items. If you
12 search for laptops, you get all the laptops that are in
13 item master. It doesn't come up by catalog.

14 THE COURT: What is the difference between a
15 product and an item?

16 MR. THOMASCH: A product can be an item, an item
17 can be a product, but it's not a catalog. You defined
18 catalog. We will live with your claim construction
19 happily, and we'll talk about claim construction in a
20 minute, but you defined what a catalog is, and item master
21 does not allow you to select a catalog to search.

22 What item master allows you to do is to --
23 because catalog is linked to a vendor. So he, Dr. Weaver,
24 identified three separate catalogs that he was picking
25 items from, Diablo, Office Max, and Baxter.

1 He never selected Diablo to search. He never
2 selected Office Max to search. He never selected Baxter
3 to search. That wasn't an oversight. It can't be done.
4 It doesn't allow it. So if you put in laptops, you will
5 get every laptop sold by any of those and any other vendor
6 who is in your item master. That's what happens. And if
7 you put in Dell laptop, you would get every Dell laptop,
8 whether that Dell laptop was sold by Dell or sold by
9 Office Max. You get them all. You cannot say, I'm going
10 to select a catalog.

11 Dr. Weaver's testimony was unambiguous. It was
12 clear. It is evidence. Cross-examination is evidence.
13 There's an element of the claim not practiced, no proof
14 that it can be practiced, and, frankly, this is -- the
15 rules about not rearguing should apply two ways. First,
16 we have never suggested that we can reargue or retry the
17 first case. Never.

18 We have said that we should look at the case to
19 understand what happened which is different than retrying
20 it. We're not trying to get a different outcome from the
21 first trial. We're trying to understand what the outcome
22 was of the first trial.

23 They are actually trying to retry the theory that
24 item master and EDI infringe claim 26. They tried that,
25 they tried it at the first trial. There was a judgment of

1 non-infringement. Claim 26, non-infringement for
2 configuration four which is item master and EDI. The fact
3 that configuration four doesn't have RSS is utterly
4 irrelevant to that.

5 RSS does not prevent you from combining item
6 master items and EDI, and that's what they testified to,
7 and the jury rejected it. They don't get to reargue what
8 they argued and lost.

9 So much of their evidence is about how you can do
10 things through item master alone, because, yes, we have
11 conceded that if item master alone contains items from
12 multiple different vendors, you can take those items, and
13 you can put them on a single requisition, and you can
14 generate multiple purchase orders.

15 We have never taken issue with that. That is
16 irrelevant to this case. It's been all through the
17 evidence, they're talking about item master, but item
18 master without Punchout has never been found to infringe,
19 and they don't get to argue it for the first time here.

20 To infringe you must use Punchout, not Punchout
21 alone. We've never said that. You have to use Punchout
22 with RSS and with the underlying componentry. That
23 system, which can operate without Punchout, when used with
24 Punchout allows you to do requisitioning. The way that
25 system was configured at the time of the first trial

1 allowed you to infringe claim 26. We have changed
2 Punchout, and in so doing, we have changed the ability of
3 Punchout alone to infringe.

4 And so there's two separate routes. They proved
5 infringement with regard to neither, but they absolutely
6 can't even try to prove infringement on EDI and item
7 master because it's been litigated, it's been resolved,
8 and we don't get to lose it when we won it.

9 Now, I want to go to the issue of claim
10 construction because, you know, you set this up, and you
11 said colorability and then infringement. And so the
12 plaintiff gets a rebuttal, at least did before. They used
13 their whole time this time but last time saved time for
14 rebuttal.

15 They got up on rebuttal, and I didn't think it
16 appropriate to object, but the first comments are about
17 claim construction. Well, now is the time to talk about
18 claim construction if we're going to talk about claim
19 construction. The *TiVo* case could be not be clearer at
20 page 883. The issue of claim construction comes into
21 effect at the time of the infringement analysis. You
22 don't get to the infringement analysis if the product is
23 more than colorably different.

24 And it's very important, and it makes a whole lot
25 of sense if you think about it, because --

1 THE COURT: Are you saying that you can't
2 consider even the concept of a claim construction, not in
3 finally deciding whether there's colorability but in
4 analyzing the issue of colorability?

5 MR. THOMASCH: Yes. Claim construction does not
6 relate to colorability.

7 THE COURT: You can't even consider what was
8 said?

9 MR. THOMASCH: No.

10 THE COURT: So you have to do it in a vacuum?

11 MR. THOMASCH: No, Your Honor --

12 THE COURT: You have to make colorability in a
13 vacuum?

14 MR. THOMASCH: No, absolutely you do not do it in
15 a vacuum, Your Honor. You don't. Now, I'd like to answer
16 that question, but I think you issued an order to me two
17 days ago that says I can't answer your question.

18 THE COURT: I just want to know if that's your
19 position.

20 MR. THOMASCH: Our position is not that you look
21 at it in a vacuum. You do not look at it in a vacuum, but
22 you do not look at it against claim construction rulings.

23 THE COURT: I didn't ask that, though. I said,
24 can you consider the claim construction as part of the
25 context in which you are analyzing the colorability

1 question, not in making the comparison, not in making the
2 ultimate decision. Your answer is no, you can't consider
3 it. It's as if there's no claim at all; right? No claim
4 construction at all, doesn't exist.

5 MR. THOMASCH: No. You look at the product. You
6 look at the features of the product that were modified,
7 and the problem is, what they're trying to do is say that
8 the features fit some other claim construction. In this
9 case, they've been telling you about a claim construction
10 that really was a construction of a different claim, a
11 means plus function claim.

12 There were different issues that were at issue
13 when the claim construction came up. Because the product
14 has been changed, if we were going to have a new trial,
15 and that is the option, the right course of conduct here
16 is clear. This product is more than colorably different,
17 this case should be dismissed, and if they think we
18 infringe they should sue us, but when they sue us, if they
19 sue us, we will be able to take that lawsuit, and we will
20 be able to defend ourselves utilizing claim construction
21 and evidence of invalidity that relate to this product.

22 THE COURT: How could you, in another case
23 involving the same patent, come up with a different claim
24 construction?

25 MR. THOMASCH: Not a different --

1 THE COURT: You'd be precluded on it. They said
2 it's dealt with in the Federal Circuit's decisions.

3 MR. THOMASCH: Not a different claim
4 construction. There was no claim construction of the
5 fourth element of claim 26. It was not construed. They
6 would like to read a claim construction of a different
7 claim and a different element and say, well, if you read
8 it that way, it only makes sense.

9 No one asked for a construction as to the
10 fourth -- the fourth element of claim 26, because in
11 regard to the product that was being tried, it wasn't
12 important. Everybody conceded that that product had the
13 capacity to combine together multiple items from multiple
14 sources. Everybody knew that, so no one asked for a
15 construction, and the Court didn't give a construction.

16 That construction would be very important. We
17 might win it or lose it, but we have a right to ask for
18 it. We would never have asked for it at the first trial
19 because it was wholly irrelevant at the first trial.
20 That's because the product was a different product at the
21 first trial. That's the problem here.

22 THE COURT: I still don't understand what your
23 point is here. I'm sorry.

24 MR. THOMASCH: My point is, Your Honor, is that
25 the fourth element, the fourth element has never been

1 construed.

2 THE COURT: What are they doing now to construe
3 it?

4 MR. THOMASCH: They're just assuming that the
5 construction is satisfied by one item even if the system
6 does not have the capacity to have more than one item from
7 different sources.

8 THE COURT: You mean they are applying the plain
9 language of the claim.

10 MR. THOMASCH: Actually not. The plain language
11 of the claim says -- when it says sources, it has a paren,
12 an S, and a paren, and we would say -- just to be clear,
13 we would say that if you have a system that has the
14 capacity to put something from one source or multiple
15 sources on, then you infringe regardless of whether it's
16 one or more.

17 It doesn't have to be more than one, but it has
18 to have the possibility of being more than one or the
19 claim makes no sense. The paren S paren makes no sense
20 if -- Dr. Weaver talked about one or a hundred. That's a
21 different thing than one or one. When you are using
22 Punchout, as I said, you have to distinguish. Item
23 master, EDI is out. We litigated it, and we won.

24 Punchout is the accusation. Punchout
25 functionality allows one source and only one source, and

1 when that's the case, you are not infringing, and we would
2 say. Now, we would say that.

3 Now, whether that's true or not depends on claim
4 construction that's never been rendered, never been asked
5 for, and does not have anything to do with the
6 colorability section. That was my point, was that she was
7 arguing claim construction, and the Federal Circuit's
8 decision in *TiVo* talks about claim construction in the
9 context of infringement, because you only get to
10 infringement if the product is not different. If the
11 product is not different, the same claim construction
12 makes sense.

13 If the product is different, which is the case
14 here, new claim construction -- it's not different. New
15 claim constructions --

16 THE COURT: How can a claim construction differ
17 on the basis of whether it's a different product? The
18 claim construction is an interpretation of words, not an
19 interpretation of the product. In fact, if I interpreted
20 it with relation to the product, that's an error.

21 MR. THOMASCH: Case after case after case says
22 that courts don't have an obligation to construe every
23 word in a claim. You only construe claim elements where
24 there's a dispute, where the claim construction matters.

25 THE COURT: That's beyond dispute. You made the

1 statement -- you are trying to make a statement about
2 claim construction and product, and I don't understand
3 what the relation -- I thought in interpreting claims, you
4 interpreted the word of the claim, not the product --

5 MR. THOMASCH: You do --

6 THE COURT: -- that's used as an illustration of
7 how the claim functions.

8 MR. THOMASCH: You are 100 percent correct, Your
9 Honor. You are 100 percent correct. But you are missing
10 my point, and that's because I'm not articulating it well.

11 The theory of infringement, the theory of
12 infringement that a plaintiff brings to the courthouse
13 will lead to a dispute about certain elements of the
14 claims. Based on that theory, you'll see which elements
15 of the claims are in dispute, and you will then limit the
16 claim construction to only those proposed by the parties
17 on those that matter.

18 What I'm saying is that with the changed product,
19 they had to change the theory of infringement. By
20 changing their theory of infringement to now say that one
21 and only one Punchout vendor site is sufficient to fulfill
22 the fourth element of claim 26, by changing their theory,
23 they now are putting us in a situation where that would be
24 contested.

25 It wasn't needed to be contested at the first

1 trial. There was no dispute at the first trial. There
2 would now be a dispute. It's not --

3 THE COURT: How are they changing their theory?

4 MR. THOMASCH: They are changing their theory
5 because their theory now is that if you have the capacity
6 to only have an item from one source on a requisition, if
7 that's your maximum capacity, which is what it is with a
8 regular Punchout website, if you only have that capacity,
9 that's enough to infringe they say now.

10 They never said that at the last trial. Their
11 theory was directly to the contrary. They sold the jury
12 on this unique ability to combine things from multiple
13 sources. We eliminated that ability. That's why our
14 product is more than colorably different and why our
15 product can't fairly be evaluated on infringement, because
16 we are -- we have -- they have a new theory of
17 infringement, the one and one only. Their old theory was
18 one or a hundred. Their new theory is one or one. Those
19 are different theories.

20 Your Honor, because I don't want to go into what
21 was alleged and proved at the last trial, I want to move
22 ahead and deal quickly with RSS, because the
23 misinformation there has been manifest. Let's start with
24 the obvious. An injunction came down on May 23rd, 2011.
25 Since that date, an infringing configuration as defined

1 with RSS has never been sold. We stopped selling it, we
2 decommissioned the RRS product.

3 I understand there's an issue --

4 THE COURT: How can you say you decommissioned it
5 when there's no evidence that the customers who are using
6 it have stopped using it?

7 MR. THOMASCH: The decommissioning is a term of
8 art. It's in the decommission notice.

9 THE COURT: What does that mean?

10 MR. THOMASCH: It means that we stopped
11 supporting it. You can no longer give -- if you have a
12 problem with your RSS, you can't get help. If you went to
13 the website and said, how do I operate RSS, there's
14 nothing there to tell you. You get no information about
15 RSS, no support about RSS.

16 THE COURT: You bought it, and you know how to
17 run it. Why do you need to go back and get instruction on
18 how to run it again? Your customer is using a product
19 they've used for years.

20 MR. THOMASCH: Your Honor talked about people
21 paying \$20 million. They pay that money --

22 THE COURT: She talked about it. I was asking
23 her a question.

24 MR. THOMASCH: It came up in a prior discussion.
25 It came up because this is software. Software problems

1 happen constantly. People have maintenance because they
2 have problems, and if they have a problem on RSS, it
3 doesn't get solved. They get no support, and they can't
4 go to the website, they can't get maintenance. There's
5 nothing there.

6 Now, we should define what the dispute between us
7 is, because there's no evidence that we sold it. There's
8 no evidence -- there's no dispute about the fact that we
9 control some of our customers. We host their systems.
10 Other customers, I would say, we don't control them, but
11 we darn well have an awful lot of influence. Those are
12 the ones where we're the administrator of their system.

13 The evidence is undisputed, for those customers
14 who we hosted, we converted them. We installed them, we
15 had them up and running on RQC. For those that we
16 administer --

17 THE COURT: But you didn't take out RSS.

18 MR. THOMASCH: You don't take out RSS. RQC goes
19 over the top of it, and RQC then replaces RSS, and the
20 prior functionality of RSS with respect to Punchout is
21 altered, it is blocked, it is diminished, eliminated.

22 THE COURT: I thought Mr. Christopherson said you
23 could run them in parallel as long as you changed the
24 bookmarks.

25 MR. THOMASCH: If you are a system administrator

1 and you do some sophisticated changes, you can change the
2 bookmarks to allow yourself to do that. I want to go to
3 that, but that's not what happened with regard to those we
4 hosted and those we administered.

5 Maintenance ended. Maintenance ended, we took
6 everything off the website, we stopped doing that.
7 Service ended. There is uncontradicted testimony. See
8 the DX-587. See what Scott Hanson says and ask yourself,
9 is this a company that took my injunction seriously. They
10 made Scott Hanson a big witness. I commend Your Honor to
11 read DX-587 where he tells his people, don't do anything.

12 Indeed, I got to tell you, Your Honor, we had a
13 company so scared they didn't want to touch RSS. He says,
14 don't install it, don't uninstall it. Just put in RQC.
15 RQC is our product. Don't get near RRS, you may not
16 service RSS.

17 That document doesn't require experts. Read
18 DX-587. What's at issue is support. Service was Scott
19 Hanson. Support was Elizabeth Homewood. Support is the
20 issue about when people call up, 7- to 8,000 phone calls a
21 month, and ask questions, what do they get told. That's
22 the support.

23 Now, there are a number of interrelated claims
24 that have been made here, Your Honor, one that we designed
25 RQC to run in parallel; two, that we told some customers

1 how to run them in parallel; three, that we gave service
2 to other parts of the configuration after a download of
3 RQC without having proven that the person who got the
4 service to other parts of the configuration was using RQC
5 and not RSS; and finally, that we didn't insist on
6 uninstalling.

7 The last one really is -- think about it. We
8 sell a product to the federal courthouse. The federal
9 court has to buy supplies for court personnel, so we sell
10 them a procurement product. We can't go into the federal
11 courthouse and uninstall their products. We can make new
12 products available, we can make the new product the one
13 that we're going to support in the future, but we can't
14 uninstall documents --

15 THE COURT: You can say RSS infringes, clerk's
16 office, stop using it.

17 MR. THOMASCH: Yes, we could.

18 THE COURT: Did you do that?

19 MR. THOMASCH: Yes, we did. I would ask Your
20 Honor to review the following documents: PX-1105,
21 PX-1057, and PX-1002, 1002. This is the famed webinar and
22 how that played out.

23 THE COURT: Which is the webinar?

24 MR. THOMASCH: Well, that's what I was going to
25 explain. 1105 are the questions that were asked live, and

1 you can see in very isolated instances a number of
2 questions were answered on the spot, very few. 1105 is
3 the questions.

4 1057 is an internal draft of the answers to the
5 questions. So the question number comes off of 1105, and
6 then you have the internal draft of the answers. That
7 draft did not go to customers. They want to make a big
8 deal about one of the answers. Because it was on an
9 internal draft, it didn't go to a customer, didn't induce
10 anyone to do anything.

11 Then Exhibit 1002 is the webinar. The webinar
12 has 295 questions. That's the final one. We took the
13 questions that came in off of 1105, and we answered them
14 in Exhibit 1002, and we posted the answers on the website.

15 I ask Your Honor to read the questions and
16 answers in their full, not to look at cherry-picked
17 examples but to read them in the full. First, you will
18 not find anything where we instruct people how to run in
19 parallel. There are statements that it can be run in
20 parallel. There is no instruction, and there is certainly
21 no inducement to get them to do so.

22 But to answer Your Honor's question, we say over
23 and over again, customers are strongly encouraged to make
24 this change from Requisition Self-Service to Requisition
25 Center as soon as possible to allow for continued support

1 by Lawson and to mitigate any future risk of infringement
2 actions brought against individual customers. We're
3 telling people you are at risk of being sued and we're not
4 going to support you, so do this as quickly as possible.

5 We responded to that at questions 12, 22, 39, 45,
6 53, 107, 130, 136, 271, 275. Similar responses at 25 and
7 at 29. At 29, customers are strongly encouraged to make
8 this change from Requisition Self-Service to Requisition
9 Center as soon as possible to allow for continued support
10 by Lawson and to mitigate any future risk of infringement
11 claims brought against individual customers.

12 Question 106, answer to question 106, we
13 recommend you install RQC as soon as possible to avoid a
14 potential interruption in support. Not to download it, to
15 install it. 66, we recommend you install RQC as soon as
16 possible. Questions three and 143, customers are
17 encouraged, however, to stop using RSS. Lawson will only
18 support RQC, and customers will mitigate risks by moving
19 to RQC. 157, it is risky to wait to mitigate. We
20 strongly encourage you to do so quickly.

21 I ask Your Honor to read the document and say, is
22 this a secret wink/wink nod/nod plan, because if it is,
23 find us in contempt. It's not. It's not even close.
24 It's a plan to get people to do something that's going to
25 be a problem for them, but we want to get them to do it,

1 and we told them if you don't do it, it's risky because we
2 won't support you, and you will be subject to patent
3 infringement actions.

4 Read the document in its entirety, and you cannot
5 draw the conclusions that they have tried to spoon-feed to
6 the Court by taking isolated examples, and, again, they
7 know who our customers are. They didn't go out, and they
8 don't prove a thing. I would say to Your Honor that in a
9 contempt case, if they want to show contempt with RSS,
10 they must show that a configuration three or five customer
11 continued to use RSS after the applicable effective date
12 of the injunction which differed depending on whether you
13 were one of the 277 health cares or not, and they need to
14 show that we provided service to that customer.

15 THE COURT: Is there any evidence of that?

16 MR. THOMASCH: None. None. And during opening
17 statements, Mr. Strapp made a big deal about the
18 possibility that customers might be still out there
19 running RSS in parallel, and Your Honor interjected, and
20 you said at page 23 of the transcript, are there systems
21 out there right now that are running RSS? The answer was
22 an implication that there may well be, that's what we
23 learned in discovery, the discovery, of course, 14,
24 15 months ago in December of 2011. Then I got up. I said
25 right at the beginning of my opening, quote, you will not

1 hear any evidence that any of Lawson's customers are
2 running RSS.

3 THE COURT: Is it your view that they cannot meet
4 the clear-and-convincing-evidence standard on this aspect
5 of the case without having testimony from customers that
6 during the period at issue following the injunction, the
7 customers were running RSS either alone or in parallel
8 with RQC?

9 MR. THOMASCH: They need two things. They need
10 that, and -- if a customer is running RSS, that is not an
11 infringement of the -- that is not a violation of the
12 injunction unless we then provide support to that
13 customer. If we have a customer who just says, hey, I
14 like RSS, I'm going to keep using it, then we have to say,
15 not with our help, you're not, and we have to disassociate
16 ourselves from that customer, and in one instance that
17 happened. But that's different. They have to have
18 someone who is doing it, and then we have to actually
19 support it.

20 There's no proof of that. I made a statement
21 that there would be no proof that customers are doing that
22 today. My statement was true. I had confirmed it before
23 I said it, and nothing came in at trial to contradict me,
24 nothing, and the brief, the reply brief says that I didn't
25 prove that there was no evidence. That one --

1 THE COURT: Well, you didn't.

2 MR. THOMASCH: That's right, I didn't. I didn't
3 because I believe in the burden of proof, and the burden
4 of proof at all stages of this proceeding is on the
5 plaintiff, and it is a heavy burden, and that heavy burden
6 is not met by raising questions. The heavy burden can
7 only be met by evidence.

8 They did not introduce the evidence. To the
9 extent that they came up with anything, they came up with
10 a series of early isolated mistaken and corrected phone
11 calls out of the thousands per month that occur, and they
12 made a big deal about Western Lake Superior Sanitary, and
13 they said, that's not a health care customer; correct?
14 Western Sanitary. Of course it's not a health care
15 customer as if that's damning evidence.

16 What's the reality? They're not a configuration
17 three or a configuration five customer. They're not in
18 this case. They're not in this case, but, nevertheless,
19 they said, oh, you told -- you answered a question about
20 RSS with them and that took place on the 9th day of June,
21 2011, and on the 15th day of June, 2011, they called back
22 for a call after installing RQC. Six days later. Exhibit
23 1058, they had installed RQC six days later.

24 Is it contempt that there was a phone call on
25 June 9? That's not what contempt is. We made a real

1 serious effort. We took this injunction very seriously.
2 We took a design-around. We tried. Whether we succeeded
3 or not could some day be determined in another
4 infringement trial, but this is the wrong mechanism for
5 doing so. This is not a contempt case, and it is not even
6 close. They did not prove anyone was using this product
7 and received service from us.

8 It is not enough to say it's theoretically
9 possible. Theoretical possibilities are not contempt,
10 particularly when we don't control that theoretical
11 possibility.

12 And you asked -- you just asked did anyone say it
13 was possible to do this disabling step. Answer, no, there
14 was no evidence on that. Now, they had a source code
15 expert, Mr. Niemeyer. They didn't call him to testify.
16 They don't want to make that part of the case. They don't
17 want to get there. They don't want to talk about
18 specifics.

19 They want to make allegations, and they want to
20 say we didn't disprove them. Their brief is replete with
21 Lawson didn't show this, Lawson didn't prove that.

22 Your Honor, I didn't need to say a thing in this
23 trial. We don't have the burden. They never carried the
24 burden, and they didn't carry it on colorability, and they
25 didn't carry it on infringement, and they haven't shown

1 that somehow other than those two ways we are somehow in
2 contempt of Your Honor's -- we have tried, we have made
3 mistakes potentially. If we did, they were isolated, and
4 they were corrected. There is no wink/wink nod/nod.

5 THE COURT: The record is pretty clear that you
6 made some mistakes, isn't it?

7 MR. THOMASCH: The record is clear. I said we
8 made mistakes, and we corrected them.

9 THE COURT: You said possibly.

10 MR. THOMASCH: No, we made some mistakes. We
11 made some mistakes. That's not what this is about.

12 THE COURT: The mistakes aren't contempt is your
13 point.

14 MR. THOMASCH: They are not. They are not.

15 THE COURT: All right.

16 MR. THOMASCH: Thank you, Your Honor. This is my
17 last opportunity. I do want to thank you again. The
18 injunction was obviously a very serious issue. I had a
19 conflict that took me to Sacramento, California, and you
20 were good enough to oblige me to allow me to make that
21 argument, and I really do appreciate that.

22 THE COURT: All right. I think Mr. Thomasch may
23 have gone a little over his time, so you get a little bit
24 of extra.

25 MR. MERRITT: He's into you for about 16 minutes.

1 THE COURT: Well, you know what? That happens
2 every once in a while. Sometimes you can't control all
3 the dynamics. We are not as stringent as --

4 MS. ALBERT: I think I still have a few minutes
5 left on my time, and I'm going to try to stay within the
6 time limit.

7 THE COURT: Tell me this: Have you changed your
8 theory of infringement because of the argument you are
9 making about item master and EDI, because you did lose a
10 configuration four argument at the trial, and he says you
11 are trying to stick them with that coming through the back
12 door and that you are doing that by virtue of a
13 different -- of a construction of claim -- element four
14 which would take the word S out of items, in essence.

15 MS. ALBERT: Okay.

16 MR. THOMASCH: Your Honor, I'm sorry to
17 interrupt, but you were quoting me. Those are two
18 separate things they said. That is not why they lost with
19 configuration four. I was not making that argument.

20 THE COURT: I'm not saying that. I didn't mean
21 to say that. I'm saying that you are -- the way you are
22 trying to get the item master and EDI into the case is
23 through a construction of element four.

24 MR. THOMASCH: I want to say we did not argue
25 that, and we don't take that position.

1 THE COURT: You didn't argue that now?

2 MR. THOMASCH: No.

3 THE COURT: What were you arguing when you were
4 arguing about four, element four talking about not
5 having -- that they went from a hundred to one?

6 MR. THOMASCH: That went to the Punchout only.
7 The two configurations, EDI and item master, the issue
8 about the fourth element, that issue is unique to Punchout
9 alone.

10 Item master can have multiple items on there.
11 That can possibly exist. I agree with counsel on that.
12 They tried to argue and they lost, and they lost for
13 different reasons.

14 THE COURT: All right. As to Punchout, are you
15 changing your theory --

16 MS. ALBERT: We are not changing our theory, and
17 indeed the -- well, I don't know if Your Honor recalls.
18 Lawson made this contention in its post-trial JMOLs that
19 the verdict could only be sustained on the basis of the
20 Punchout module. ePlus opposed that. You denied the
21 JMOL.

22 We went up on appeal. In our briefs to the
23 Federal Circuit, we specifically briefed the fact that
24 claim 26 could be infringed in multiple different ways.
25 The Federal Circuit decision addresses item master, EDI,

1 Punchout. It addresses all of the components of
2 configurations three and five and how those components are
3 used in the context of claim 26, and I would refer Your
4 Honor to *ePlus v. Lawson Software*, 700 F.3d 509 at pages
5 514 and 520.

6 We're not changing our theory, and, indeed, *TiVo*
7 says there is to be no retrial on elements conclusively
8 established at trial which remain unchanged. It's
9 undisputed that item master has not been changed. It's
10 undisputed that EDI has not been changed.

11 These infringement issues, as you'll see in the
12 Federal Circuit opinion, have been conclusively
13 established, affirmed on appeal, and are now law of the
14 case.

15 THE COURT: He also says -- I made a mistake as
16 to what I'd written down. I can't read my own writing.
17 He also says that item master and EDI don't violate
18 element two.

19 MS. ALBERT: Item master and EDI. That issue,
20 again, was already addressed in the underlying trial.
21 It's already been decided at the Federal Circuit. They've
22 lost on that issue. It's law of the case. We can't retry
23 whether or not you can select catalogs --

24 THE COURT: He says item master can't select --
25 that you can't -- he can't meet the selecting product

1 catalogs to search element. You can add EDI and item
2 master together.

3 MS. ALBERT: That was Lawson's contention at
4 trial. They lost on that issue with respect to
5 configurations three and five. That's been conclusively
6 established and affirmed on appeal, and, moreover, the
7 modification that was made to RSS to form RQC has no
8 relationship to item master at all, nor does it have any
9 relationship to the capability of searching item master.
10 The functionalities remain unchanged, and *TiVo* tells us
11 there is to be no retrial on elements conclusively
12 established at trial which remain unchanged.

13 Now, as to the claim construction argument with
14 respect to element four, *TiVo* prohibits the Court from
15 reinterpreting the patent. It says specifically --

16 THE COURT: Was there a claim construction on
17 element four?

18 MS. ALBERT: There wasn't, but no one asked for
19 it in either the underlying trial or in this proceeding.
20 They never asked for it. Under *TiVo*, *TiVo* directs the
21 Court that in making the infringement evaluation in a
22 contempt proceeding, out of fairness, the district court
23 is bound by any prior claim construction that it had
24 performed in the case.

25 THE COURT: What if there's no claim

1 construction? He says you are trying to change the claim
2 construction -- I mean you are trying to use this against
3 the different product and that, therefore -- and that
4 product doesn't offend element four.

5 MS. ALBERT: Well, as Your Honor was mentioning
6 during the colloquy with Mr. Thomasch, the claim
7 construction is to be considered in light of the intrinsic
8 evidence, and the most valuable intrinsic evidence here is
9 the language of the claim element itself which says
10 building a requisition using data relating to selected
11 matching items and associated source --

12 THE COURT: So does that include data relating to
13 a selected matching item and its associated source?

14 MS. ALBERT: Yes. It also includes a requisition
15 that would have data relating to multiple selected items
16 associated with multiple sources.

17 THE COURT: All right.

18 MS. ALBERT: Now, as far as whether or not Lawson
19 uses RQC configurations three and five, Your Honor's
20 original question was, does Lawson use RQC configurations
21 three and five in its business. I said yes. It is,
22 indeed, a business purpose to use those systems to try to
23 sell those systems to customers or for demonstration and
24 training purposes.

25 THE COURT: Yes, but I also asked you whether or

1 not they use -- this was related to slide 30. Whether
2 they have installed and used RQC for its own procurement
3 operations as in its own business, and he says, no, and
4 the answer to that is in their finding of fact number 320,
5 I believe, and you said, yes. I don't think you cited the
6 finding of fact or evidence, but you may have and I didn't
7 write it down.

8 MS. ALBERT: The evidence that we rely on, some
9 of which is found on slide 30, is the statements of
10 Lawson's own personnel indicating that Requisition Center
11 is installed here, and Lawson moved to Requisition Center
12 with one day's work.

13 THE COURT: Does that mean in their own business
14 operations is the only question.

15 MS. ALBERT: Mr. Christopherson testified that
16 Lawson uses the RQC systems in its own business operations
17 for procurement.

18 THE COURT: My recollection is that there was
19 testimony that says that, and I don't know where it is,
20 but I just have felt that that was true. In reading some
21 of the briefs, I remember coming across that and saying,
22 yes, I remember that testimony.

23 MS. ALBERT: Yes, he did say that. I think the
24 dispute with Mr. Thomasch may lie in whether or not
25 Lawson's internal procurement systems with RQC also

1 include Procurement Punchout.

2 THE COURT: Yes, that's his point. It says,
3 Lawson does not use Punchout. That was his point as
4 demonstrated in finding of fact of his, 320.

5 MS. ALBERT: And I think at the time the
6 documents that are cited on slide 30 were drafted, Lawson
7 had not installed Procurement Punchout in conjunction with
8 the RQC systems. So that evidence was evidence directed
9 to only an RQC system, and it was unclear whether or not
10 Punchout had been installed.

11 THE COURT: Is there any evidence since these
12 documents were prepared, any evidence in the record that
13 Lawson uses RQC with Punchout installed?

14 MS. ALBERT: The only evidence in the record that
15 Lawson uses RQC configurations with Punchout are -- is the
16 testimony of Mr. Christopherson and Mr. Lohkamp that they
17 use such systems to perform customer demonstrations. But
18 this type of use is also an infringing use.

19 THE COURT: I'm not suggesting that it isn't.
20 The issue is whether you make a finding of fact that they
21 use it in their own business as opposed to using it for a
22 business purpose which is -- it's just a matter of
23 accuracy.

24 MS. ALBERT: Well, our findings of fact, I
25 believe, said that Lawson uses the systems with RQC for

1 internal procurement which was Mr. Christopherson's
2 testimony, and then also Lawson uses systems with RQC and
3 Punchout to perform customer demonstrations for sales
4 purposes, marketing purposes, and training, and the
5 Federal Circuit specifically found that the fact that
6 Lawson demonstrated its systems to customers was evidence
7 of direct infringement, and I would cite you to the
8 Federal Circuit opinion at 700 F.3d at pages 520 through
9 521.

10 THE COURT: All right.

11 MS. ALBERT: Now, with respect to the issues
12 relating to the customers' ongoing use of RSS, the
13 testimony --

14 THE COURT: His basic position is it doesn't make
15 any difference if the customers still use it. The only
16 violation of the injunction would be if the customer is
17 using it and they service it, help maintain it, et cetera.

18 MS. ALBERT: But there was evidence in both
19 Lawson witness testimony as well as documents that
20 customers having RSS live in their systems were being
21 provided maintenance and support and instructional
22 services by Lawson after the date of the injunction.

23 THE COURT: Yes. What I think he says is, yes,
24 that is true, they made a mistake, and that if you look at
25 the picture as a whole, what has happened is that that did

1 happen, but they realized -- they shut that operation down
2 fairly quickly, and while there was several statements in
3 the webinar that would argue to the contrary, if you look
4 at the final statement of the webinar, questions and
5 answers that were posted on the website, that, in essence,
6 what they -- that they said, we are no longer maintaining
7 this, you are using it at your own risk, and the risk you
8 are running is a suit for infringement, and that under the
9 circumstances you can't make an infringement finding on
10 the basis of a few isolated statements and comments in a
11 few documents that occurred in a relatively short period
12 of time that ultimately were straightened out at the end
13 of that short period of time. As I understand his
14 argument, that's really what he's saying. Why isn't that
15 right?

16 MS. ALBERT: Well, it's not an isolated statement
17 when you tell over 800 customers how to change the
18 bookmarks so that they can continue to use RSS in parallel
19 with RQC.

20 THE COURT: So your real point is that they told
21 them how to change the bookmarks.

22 MS. ALBERT: Right.

23 THE COURT: That's the evidence that they
24 actually are maintaining the system or violating the
25 injunction.

1 MS. ALBERT: They are violating the injunction by
2 providing instruction and assistance for the ongoing use
3 of the infringing configurations which was a separate
4 provision --

5 THE COURT: They've given maintenance
6 instruction, service instruction about how to violate the
7 injunction, and they did that by telling them how you can
8 function if you just change the bookmarks.

9 MS. ALBERT: Right.

10 THE COURT: He says in response to that, that
11 isn't so, that, yes, those instructions were given, but
12 you had to be a system administrator in order to do that
13 and that there's no proof that anybody ever did that.

14 MS. ALBERT: Well --

15 THE COURT: Isn't that what his response to your
16 argument is there?

17 MS. ALBERT: There was proof that people were
18 doing it because people in the Plaintiff's Exhibit 1058, I
19 believe, we saw evidence that customers were actually
20 asking questions to Lawson for how to do this.

21 THE COURT: All right.

22 MS. ALBERT: And not only was instruction
23 provided to run RSS and RQC in parallel, but, for example,
24 Ms. Homewood testified that as long as the customer had
25 downloaded RQC, that was the flag to allow Lawson to

1 continue to provide maintenance and support services to
2 that customer. They never checked whether or not the
3 customer had actually installed RQC.

4 THE COURT: So by providing instruction in how to
5 operate them in parallel, by making the trigger a download
6 -- for continued service a download, and the evidence that
7 a download alone doesn't do anything constitutes the
8 evidence of inducing the customer to violate the
9 injunction; is that the structure there, your point?

10 MS. ALBERT: That is my point. Additionally, Ms.
11 Homewood testified that as long as the customer had
12 downloaded RQC, they changed that flag. They would
13 continue to provide maintenance and support, and they
14 would continue to provide maintenance and support for
15 other modules in the infringing configurations.

16 So the fact that they may not have asked the
17 question whether they were still running RSS, because they
18 saw the download flag, they then proceeded to provide
19 maintenance and support services on the actual infringing
20 configuration. And I would direct you to her testimony at
21 pages 849 and 850 of the transcript, for example.

22 THE COURT: What is her name?

23 MS. ALBERT: Ms. Homewood. The question was
24 asked, "Question: If you could turn in your notebook just
25 for reference back to Plaintiff's Exhibit 1034, we'll

1 leave this on the screen here. Now, let's say a customer
2 of Lawson downloaded RQC and that customer had
3 configuration five on their system. Okay?

4 Answer: Okay.

5 Question: And the customer didn't actually
6 install and implement RQC but just continued running RSS.
7 Do you understand my question?

8 Answer: I believe so, yes.

9 Question: Now, if that customer contacted Lawson
10 after the injunction and asked for support on Procurement
11 Punchout, Lawson would provide support for Procurement
12 Punchout, correct?

13 Answer: Correct. If they downloaded RQC and the
14 product configuration records showed RQC.

15 Question: That's even if the customer hadn't
16 actually installed and implemented RQC, correct?

17 Answer: Potentially, yes.

18 Question: And that's even if the customer was
19 still running RSS, correct?

20 Answer: It could be as we don't know that at
21 that point in time, no.

22 THE COURT: What transcript pages are you
23 referring to?

24 MS. ALBERT: 849 through 850. So it's not just
25 -- the relevance isn't just with respect to our continuing

1 to provide support on RSS. The injunction prohibits
2 Lawson from continuing to provide maintenance and support
3 on the entire configuration. And Ms. Homewood said they
4 would do so as long as there was the download flag which
5 doesn't really mean that the customer has actually
6 implemented RQC.

7 Does Your Honor have any further questions?

8 THE COURT: No.

9 MS. ALBERT: Thank you.

10 MR. THOMASCH: Your Honor, may I make one
11 correction to this one document, give you a page cite?

12 THE COURT: Yes.

13 MR. THOMASCH: I would direct Your Honor to
14 Exhibit 1002.

15 THE COURT: You cited that before.

16 MR. THOMASCH: That's the webinar.

17 THE COURT: The final versions of the --

18 MR. THOMASCH: You just heard that 800 people
19 were told -- were given instructions as to how to
20 download. I would ask Your Honor to review page nine of
21 18 which, on my copy, is RQC 0000646. There are ten
22 questions under a heading, Running Requisition Center in
23 Parallel with Requisition Self-Service. Those are the ten
24 questions. There are no such instructions. It is said on
25 June 3rd that it can be done. There are no instructions

1 as to how to do it.

2 THE COURT: All right. We'll take an hour for
3 lunch, and I'll hear the remedies section after that.

4

5 (Luncheon recess.)

6

7 MR. STRAPP: Your Honor, I'm going to be
8 addressing ePlus's request for damages in this matter.
9 And in the binder that we handed to you earlier, we have a
10 tab marked remedies. Underneath that tab are the slides
11 I'm going to run through in my presentation.

12 ePlus makes the following request for relief if
13 Lawson is found in contempt: First, ePlus seeks a
14 disgorgement of Lawson's gains, and as I'll explain, we
15 present different measures of disgorgement. There are
16 disgorgement of Lawson's revenues, disgorgement of
17 Lawson's gross profits, and disgorgement of Lawson's
18 incremental profits.

19 The second measure of remedies that ePlus seeks
20 here is pursuant to section 284 of the patent statute, and
21 that section of the patent statute authorizes courts to
22 enhance up to three times the amount of damages found.

23 Third, ePlus seeks, pursuant to section 285,
24 attorneys' fees and costs, and fourth, ePlus seeks as well
25 a course of remedy from the date that contempt is entered

1 until such time as Lawson is in compliance with the Court
2 order. And finally, ePlus would seek that if Lawson
3 intends to design around or attempts to design around
4 again, that it first request -- first be required to
5 request pre-approval from the Court.

6 THE COURT: If I grant that motion and I approve
7 it, can I be disqualified from any further litigation in
8 the case? Or if I disapprove it, either way.

9 MR. STRAPP: I hope you don't mind if I choose
10 not to answer that one.

11 THE COURT: Discretion and valor.

12 MR. STRAPP: So, let me start off with gross
13 profits. Gross profits is an award that is not uncommon.
14 Contrary to Lawson's suggestions in its post-hearing
15 briefing, it's not uncommon in a patent contempt
16 proceeding.

17 In fact, just since 2005, there have been three
18 separate district court opinions, including one which was
19 affirmed by the Federal Circuit, in which disgorgement of
20 gross profits was awarded after contempt was found in a
21 patent case.

22 And I think it's instructive, the rationale that
23 each of those courts gave, because I think they apply with
24 equal force here, and I want to turn first to a decision
25 from 2005 that was affirmed by the Federal Circuit called

1 *Brine v. STX.*

2 In that case, the district court gave three
3 different reasons for its disgorgement award of gross
4 profits. First it said, there is a risk that if
5 disgorgement of gross profits is not awarded, the
6 plaintiff won't be made whole.

7 Second, the court said, there's a specific and
8 acute need in a contempt proceeding to make sure that the
9 plaintiff is fully compensated, and finally, the Court
10 said, gross profits is appropriate because it bears a
11 direct relationship and is directly proportional to the
12 degree of infringing activity.

13 The *Broadcom* court -- that's the Central District
14 of California, 2008 -- said, disgorgement of gross profits
15 is not a punitive measure, as Lawson has suggested in its
16 papers, but rather it's merely transferring gain from the
17 contemnor to the patent owner. And finally there's a
18 third case, 2012, decided a few months ago where, again,
19 disgorgement of gross profits was awarded.

20 Disgorgement of gross profits in this case is
21 particularly appropriate because it's one area where the
22 parties agree. The parties don't agree on much in this
23 contempt proceeding, but the parties do agree on what
24 Lawson's gross margin is and on how to calculate that
25 gross margin.

1 There was evidence from both experts that the way
2 you get down to a gross margin line is by taking the
3 direct costs of licensing, maintenance, and service from
4 the revenue that Lawson has gained for its infringing
5 configurations, and when you look at the purchase and
6 profit-and-loss statements that Lawson produced for its
7 fiscal year 2012 --

8 THE COURT: You all are in agreement on the
9 method, not the amount, because you differ as to the
10 revenues.

11 MR. STRAPP: That's correct, and I'll get to
12 that, but the gross margin percentage, that's where
13 there's agreement, and I have that on the slide here. The
14 parties agree that gross margin is 66.1 percent.

15 So that's one area where the parties do agree,
16 and that comes from Lawson's own documents. That's not a
17 construct or a calculation you need a regression model for
18 or you need to estimate based on some party's testimony.
19 You can just look at the profit-and-loss statement. You
20 have a gross margin, you deduct that gross margin from
21 whatever revenue number you start with, and there you have
22 Lawson's gross profits.

23 Unlike the gross profits, the incremental profits
24 really are purely an economic construct. Lawson and --
25 and no other public company reports incremental profits in

1 internal documents or in public SEC statements, and Dr.
2 Putnam, when he was asked on the stand about incremental
3 profits, he said, it's not a concept that would be used by
4 any accountant, it would never appear on a profit-and-loss
5 statement, it's purely an economic construction. Those
6 are the words of Lawson's expert.

7 So the question then is, if you're going to look
8 at incremental profits --

9 THE COURT: But your man said that he thought
10 that incremental profits was the right way to measure the
11 gain.

12 MR. STRAPP: He did say that, and what he said
13 was, in an economic concept -- in an economic construct,
14 incremental profits is the appropriate measure of the
15 gain. Now, the question is whether or not you can
16 accurately calculate it, and Dr. Ugone, ePlus's expert,
17 attempted to calculate what the incremental profits are,
18 and the way that he did it in this case was he said,
19 there's no evidence that any of Lawson's operating
20 expenses varied directly with revenues associated with the
21 infringing configurations, but in a conservative effort to
22 estimate incremental profits, I'm going to deduct all
23 sales and marketing operating expenses, and that's what he
24 did to provide an estimate of incremental profits.

25 In this case, though, I would submit that you can

1 use that measure as one measure of disgorgement. You can
2 also use gross profits, but if you are going to use an
3 incremental profit measure, the one that I would strongly
4 urge you not to use is that one which is proffered by
5 Lawson's expert, Dr. Putnam, and the reason why is, first
6 of all, as Your Honor recognized in docket 1032, it's
7 Lawson's burden of proof to prove any deductions for its
8 costs from gross revenues when it's trying to show you
9 what the appropriate profit margin is here, and the way
10 Lawson went about trying to discharge that burden of
11 proof, especially with respect to incremental profits, we
12 would submit, is fatally flawed.

13 The reason is Dr. Putnam created a regression
14 model, and he said, I'm going to use this regression
15 model, and I'm going to use it to predict exactly what
16 Lawson's incremental profits are, but the inputs and the
17 data he used for his regression model bear no relationship
18 to the predictions he was trying to make with his model.

19 The inputs were worldwide revenue, worldwide
20 costs. The prediction was for U.S. revenues, U.S. costs.
21 The input was all Lawson products worldwide. The
22 prediction was for only the infringing configurations.
23 The input was for pre-Infor acquisition, pre-injunction
24 data. The prediction was for post-acquisition injunction
25 period data.

1 And when Dr. Putnam was asked, well, why didn't
2 you use the more relevant data set that you did have, you
3 had them, the fiscal year 2011 and fiscal year 2012
4 profit-and-loss statements, he said -- and it was telling.
5 He said, the reason I didn't use it is because it was not
6 comparable to the data I actually did use.

7 Obviously that begs the question, if you are
8 using data that's not comparable to the period you are
9 trying to predict, you should scratch that data, discard
10 it, and create a new model using the data that's relevant.

11 He chose not to do so, and we submit that that's
12 the reason the predictions he actually came up with using
13 his regression model were wildly off the mark.

14 Now, Lawson also asked the Court to consider a
15 measure of disgorgement based on its net profits, but
16 Lawson recognizes, you know, Mr. Samuelson recognized, Dr.
17 Putnam recognized that measure of net profits deducts all
18 costs of doing business. Mr. Samuelson described some of
19 those costs were in his cross-examination, things like
20 audit costs, costs with closing books, costs for salaries
21 of developers and other people who don't work on the
22 infringing configurations. All of those costs would be
23 deducted if you were going to use a net profits
24 disgorgement measure.

25 Lawson searched far and wide to find some

1 authority for its position, and what it came up with was a
2 1939 copyright case from the Second Circuit. That case,
3 though --

4 THE COURT: Pretty good judge, though.

5 MS. ALBERT: It was a great judge. It was
6 Learned Hand, and if we want to look at Learned Hand's
7 words of wisdom from that case, this is what he said. He
8 said, overhead -- that is overhead costs -- which do not
9 assist in the production of the infringement should not be
10 credited to the infringer.

11 Lawson made no showing whatsoever that costs
12 associated with auditing its books or closing its books or
13 costs associated with all of its travel costs or with all
14 of its developers somehow assisted in the production of
15 the infringing configurations. And, in fact, the only
16 evidence that did come into the record was from a
17 document, PX-1269, which showed that the only costs that
18 Lawson could identify specifically with respect to the
19 infringing configurations were, for example, development
20 costs of \$38,000, testing costs of \$75,000.

21 These were the de minimus expenses that Lawson
22 said they actually did incur that had to do with the
23 infringing configurations, and you may recall at the end
24 of Mr. Samuelson's testimony, I asked him on
25 cross-examination, are there any other costs that you can

1 specifically identify that Lawson incurred that relate to
2 the infringing configurations beyond these de minimus
3 costs that you are -- that Lawson identified in its
4 interrogatory responses, and he said no.

5 And Your Honor also asked Dr. Ugone, you remark
6 that it's not surprising that they didn't incur additional
7 costs because the development time was so quick. It only
8 took a couple of weeks to come out with these products, so
9 how could it be that they had vast operating expenses or
10 vast overhead expenses that are attributable to these
11 infringing configurations?

12 For those reasons, we submit that in this case,
13 even though as a pure economic construct incremental
14 profits may be the appropriate measure, in this case we
15 would submit that disgorgement of gross profits is the
16 appropriate measure for a disgorgement remedy.

17 The bottom line is, Lawson has not met its burden
18 to show any costs beyond the direct costs associated with
19 licensing, maintenance, and service that should be
20 deducted, and, therefore, direct costs is the correct
21 measure, we would submit.

22 Now, we've put in this slide here, 43, a chart
23 that has all the different disgorgement measures that we
24 have presented through the evidence, both through Dr.
25 Ugone and Dr. Putnam. On the left-hand side of the chart

1 are the measures, the revenues measures, the gross profit
2 measures, and the incremental profits measures, and we
3 have three columns in this chart.

4 The first column is the actual data we have from
5 Lawson. That data only goes through the end of
6 November 2012.

7 The second column says, if you take the average
8 daily rate based on the actual data that we have, how much
9 are they making per day in revenue, how much are they
10 making per day in gross profits and incremental profits,
11 and then the third column, we take that daily rate from
12 the end of November 2012 through today, and we present you
13 with some numbers here that reflect what it would be --
14 what the total would be if they were getting a -- going
15 forward in a straight line of revenue, a straight line of
16 gross profits.

17 Of course we don't have the data, so we don't
18 know that the numbers on the third column are exactly
19 accurate, but they are estimated based on Lawson's average
20 daily rate through November 2012.

21 Now, I want -- Your Honor asked about the revenue
22 and the disagreement on the revenue. There are really
23 only two disagreements about what the appropriate revenue
24 measure should be. The first disagreement is whether or
25 not Lawson fairly earned license revenue from its health

1 care customers during the injunction period. I mean
2 during the sunset period.

3 Lawson takes the position that under the terms of
4 the sunset provision, it was permitted to license, to sell
5 new licenses, sell new software, sell licenses for
6 additional users to use the software that was infringing
7 to its health care customers.

8 ePlus takes the position that the fair and
9 natural reading of the sunset provision is that that was a
10 provision that was directed to service and maintenance for
11 customers that already had the infringing configurations.

12 THE COURT: Is there any evidence of what they
13 did in getting -- issuing licenses, making license revenue
14 during that period?

15 MR. STRAPP: That evidence suggests that, I think
16 it's about \$1.5 million to \$2 million worth of license
17 revenue for health care customers during the sunset
18 provision, and so that's one area where the parties'
19 revenue figures differ.

20 The other revenue disagreement is -- well, it's
21 not really even a disagreement. It's just that there is
22 two different approaches to apportioning LSF and process
23 flow, and Dr. Ugone explained both apportionment methods.
24 One measure says you take all LSF and process flow
25 revenue, because LSF and process flow are part and parcel

1 of the infringing configurations just as are the core
2 system procurement modules, just as are Punchout and EDI,
3 and, therefore, 100 percent of the LSF and process flow
4 revenues should be included in the revenue base. And the
5 numbers that we've presented on slide 43 take all LSF and
6 process flow revenue into account.

7 A second way of handling LSF and process flow
8 revenue is to apportion LSF and process flow revenue. If
9 Your Honor was inclined to apportion LSF and process flow
10 revenue, because LSF and process flow are models that can
11 be theoretically used with other software beyond the
12 infringing configurations, Dr. Ugone presented an
13 apportionment method which said, take only 15 percent of
14 the LSF process flow revenues, discard the other
15 85 percent.

16 Now, Lawson says -- the difference between Lawson
17 and ePlus with respect to LSF and process flow is Lawson
18 says you must apportion LSF and process flow revenue.
19 ePlus says it's at your discretion whether to apportion
20 LSF and process flow revenue. We've presented as Exhibit
21 A, I believe, maybe it's Exhibit C to our reply
22 post-hearing brief what the numbers would look like if you
23 apportioned LSF and process revenue, but those are the
24 only two disagreements about revenue. The parties
25 otherwise agree on how to calculate revenue, the SKU

1 approach, apportionment for service, apportionment for
2 large suite SKUs. Those are the only two disputes.

3 I want to turn now to willfulness. The question
4 is, if Your Honor finds Lawson in contempt, finds that
5 there are no more than colorable differences and that
6 Lawson has infringed, is that infringement willful
7 infringement or not.

8 The case that sets the standard for willfulness
9 is a 2007 case called *In re: Seagate* decided by the
10 Federal Circuit in an en banc opinion, and it sets out a
11 two-part test for willfulness. The first part of the test
12 is, is there an objectively high likelihood that the
13 infringer's actions constituted infringement of a valid
14 patent.

15 The second part of the test is, was this
16 objectively defined risk either known or so obvious that
17 it should have been known to the accused infringer.

18 Almost every case that I've seen where there was
19 a finding of contempt, there was also a finding of
20 willfulness, and it's not surprising because once you get
21 to a contempt stage, there can be no dispute that the
22 infringer knew about the patent, knew that it had been
23 decided to be valid and infringed by a jury, knew that
24 there was an injunction, yet proceeded to either use the
25 original infringing product or come out with a

1 design-around, and I think it's interesting and noteworthy
2 that although Lawson submitted voluminous post-hearing
3 briefing, over 250 pages, the *Seagate* case, which is the
4 seminal case, doesn't get mentioned even a single time.

5 THE COURT: 250 pages? Are you talking about --
6 does that include the colorability and the infringement
7 briefs, too?

8 MR. STRAPP: That includes all of their briefs,
9 colorability, infringement, remedies.

10 THE COURT: Why would they mention *Seagate* in two
11 of those?

12 MR. STRAPP: I don't know, but since I didn't
13 find it in the remedies brief, I thought maybe I would
14 find it somewhere else, they had made reference to it, or
15 maybe in the 175-page proposed findings of fact, but it's
16 nowhere. It's not in any of those briefs, and I think
17 that the reason why Lawson doesn't really even present any
18 defense to willfulness is the following: First of all,
19 with respect to the original configurations with RSS,
20 objectively, there can be no dispute. Lawson knew about
21 the patent, knew that it had been found valid, knew that
22 they were infringing, and knew that there was an
23 injunction, and yet, notwithstanding that knowledge,
24 Lawson designed RQC to run in parallel with RSS, Lawson
25 aided, abetted, and instructed its customers on how to

1 continue using RSS even after downloading RQC, and I think
2 that as well the evidence is overwhelming on willfulness
3 with respect to the RQC configurations.

4 The first point I want to make here is that
5 although Lawson suggested that this was a lawyer-driven
6 process and that the lawyers had final veto or approval
7 power over changes that were proposed by the business and
8 the product development individuals, in some instances, it
9 actually worked the opposite way.

10 Lawson's lawyers proposed modifications to Lawson
11 businesspeople and to Lawson product development people
12 and said, if you want to avoid infringement, here's what
13 you need to do, and Lawson rejected it. So, for
14 example --

15 THE COURT: Is there any record evidence that
16 shows why Mr. Christopherson did not accept that advice?

17 MR. STRAPP: Not through his testimony. The only
18 evidence of record is the particular email exchange from
19 which Mr. Christopherson received this suggestion from
20 counsel but decided not to accept it.

21 THE COURT: Is there a reason given?

22 MR. STRAPP: I think that reason set forth in the
23 document is that it would have been too disruptive to --
24 it was an unworkable proposal. It would have been too
25 disruptive to its businesspeople, and it would have had --

1 it would not have satisfied its customers.

2 Beyond that, I can only surmise why Lawson chose
3 not to accept the advice of its counsel. But there's
4 other evidence as well. It's not just based on the
5 rejection of the advice of counsel. There's also, for
6 example, knowledge in admissions by Lawson that claim 26
7 is, quote, right on the mark, so it's going to be a tough
8 one to navigate. This is at slide 47. That Lawson, when
9 it studied the issue, said, with respect to the
10 functionality of Punchout, we have no easy answers.

11 Now, you heard a lot of talk about the
12 functionality of Punchout and how it was severely changed.
13 What Lawson first thought internally was, we don't have
14 any answers on the functionality of Punchout. If we're
15 going to have a solution, it's going to mean we're going
16 to have to do some alternative where we use what they
17 called the crippled Punchout option which was meant to
18 suggest that ePlus -- Lawson customers could only punch
19 out to licensees of the ePlus patent. That was eventually
20 rejected.

21 And we also have evidence that internal Lawson
22 personnel said to each other, does it scare you as much as
23 me that at this point nobody at the courts or ePlus has
24 said that RQC complies. Answer, absolutely, exclamation
25 point. So we submit that this is overwhelming evidence of

1 willfulness.

2 Lawson doesn't even address the willfulness
3 standard in its briefing, and once the question of
4 willfulness is decided, the appropriate place to move is
5 to the question of whether to enhance damages.

6 THE COURT: What are the choices there?

7 MR. STRAPP: The choices there are either not to
8 enhance damages at all or to enhance damages up to three
9 times.

10 THE COURT: How do you chose between doubling or
11 tripling?

12 MR. STRAPP: Your Honor, after you get through
13 the culpability threshold, whether or not enhanced damages
14 can be awarded, which is based on whether there's a
15 finding of willfulness, the question as to whether to
16 enhance damages and to what extent, courts have looked to
17 these factors that are set out in the case called *Read v.*
18 *Portec*. It's a 1992 Federal Circuit case. We have the
19 cite on slide 48.

20 It's a totality-of-the-facts-and-circumstances
21 test, and Your Honor has the discretion to look at all
22 facts and circumstances, but the particular factors laid
23 out in *Read v. Portec*, we would submit in this case,
24 should lead to a finding of enhanced damages.

25 There was a suggestion by Lawson in its

1 post-hearing briefs that Your Honor would be somehow
2 charting new waters if you enhanced damages in this case,
3 but actually Lawson's counsel, I think about a year ago,
4 at a hearing when we had motions in limine pending
5 suggested that that's not the case, that in instances like
6 this, courts have doubled the actual loss, have tripled
7 it. That comes from Lawson counsel. That's at the bottom
8 of slide 48.

9 I want to go through some of these *Read* factors
10 that you look to in order to determine whether or not to
11 enhance damages. One factor says, whether the infringer,
12 when he knew of the other's patent protection,
13 investigated the scope of the patent and formed the
14 good-faith belief that it was invalid or that it was not
15 infringed.

16 Under this factor, we would submit that Lawson --
17 this factor would suggest that enhanced damages are
18 appropriate, because, first of all, Lawson did know of the
19 patent and the Court's injunction. Lawson, nonetheless,
20 instructed its customers go ahead and continue using the
21 product that was found to infringe, and Lawson knew all
22 along and had investigated the scope of the claim, but
23 instead of coming to a good-faith belief that it was not
24 infringing claim 26, it came to a good-faith belief that
25 claim 26 was right on the mark.

1 Further to this point, there are cases
2 interpreting this particular factor that say, one thing
3 you do look to that can be a reason not to enhance damages
4 under this factor is if the party who was found in
5 contempt went out and sought formal opinion of counsel
6 that they didn't infringe, and if competent patent counsel
7 said, you don't infringe, that can be a reason not to
8 apply this factor and enhance damages.

9 In this case, Lawson answered an interrogatory
10 response. This was interrogatory number 17. It's in the
11 record at PX-1269, and they said in that interrogatory
12 response that they did not seek a formal written opinion
13 of counsel, and, in fact, as I mentioned just previously,
14 Lawson actually ignored the advice of counsel it did get
15 with respect to additional modifications that were
16 necessary to design around claim 26.

17 Another factor that the Court in *Read v. Portec*
18 says you look to is whether or not the defendant took any
19 remedial action after it was found to infringe a valid
20 patent. In this instance, Lawson took action, but we
21 would submit that it was not remedial whatsoever. In
22 fact, we would submit that it was just a coverup, because
23 what Lawson did was require its customers to download RQC
24 with nothing more. And once the download was complete, as
25 Ms. Albert read from Ms. Homewood's testimony, support and

1 maintenance continued with respect to the original
2 infringing configuration.

3 I have here a quote from Mr. Hanson who confirms
4 that the act of downloading RQC doesn't actually render
5 RQC operational. He said, that's correct. You still need
6 to install it.

7 There's a document that's in the record at
8 PX-1034 where Lawson says, downloading RQC changes their
9 configuration. We have no knowledge of if they are
10 running it or not, so we will support them again.

11 Lawson took no remedial action here, and, in
12 fact, the action it took was affirmatively to instruct its
13 customers on how to continue using the original infringing
14 configurations even after the download of RQC which, in
15 and of itself, did nothing.

16 Another factor that the *Read* decision says to
17 look to is the duration of defendant's misconduct. Now,
18 there's a 2009 district court case called *Funai v. Daewoo*
19 *Electronics* that interprets this factor and says, when you
20 look at this factor, what's most important is whether or
21 not the infringer continued to infringe after the judicial
22 finding that a particular device infringes, and here, we
23 would submit that there's been a judicial finding, both at
24 the verdict stage, at the injunction stage, at the Federal
25 Circuit stage, and yet we're still here, Lawson continues

1 its activities even today.

2 Finally, another factor that the *Read* court says
3 to look at is whether or not there was any misconduct in
4 the litigation. Part of this litigation included the
5 injunction proceedings. If you could turn to slide 53,
6 what we've done here is provided Your Honor with a
7 timeline of the events between February 2011 and May 18th,
8 2011, and I touched on this a little bit in the opening
9 statement a little while back, but what you'll see here in
10 this timeline is that between February 8th and March 25th,
11 Lawson had begun working on a development -- had begun
12 developing a replacement of RSS, had already begun unit
13 testing.

14 When Mr. Hager got to the stand on March 25th,
15 2011, he didn't say one word about RQC or about any
16 development plans. And Lawson suggested that's okay --

17 THE COURT: They say to the contrary in their
18 brief.

19 MR. STRAPP: Lawson suggests -- well, what they
20 say in their brief, I believe, Your Honor, is that he
21 wasn't asked any questions about RQC. They say that after
22 the hearing was over, that they submitted a paper to the
23 Court in which they suggested that there was a
24 design-around in the works.

25 THE COURT: A letter.

1 MR. STRAPP: A letter, exactly. But the
2 letter -- neither in the letter nor anywhere else did
3 Lawson ever suggest the testimony Mr. Hager had provided
4 to the Court was inaccurate in any way with respect to the
5 public interest factors. Never did they say, this
6 design-around is going to alleviate the morale issues that
7 Mr. Hager testified about, the loss of jobs, or that a
8 hospital's quality of care would somehow be interrupted,
9 but what I think is most telling on this timeline, Your
10 Honor, is that five days after Mr. Hager got up on the
11 stand and made his testimony and gave his parade of
12 horribles, he said internally at Lawson, we have a
13 solution for RSS now. That was on March 30th, 2011, five
14 days later.

15 Now --

16 THE COURT: What was being said in the briefs
17 that ensued the injunction hearing? The briefs were
18 filed -- I mean the hearing was March 25th, and the briefs
19 were filed after that. What was said in the briefs that
20 were filed about this issue?

21 MR. STRAPP: There was a footnote in Lawson's
22 brief after this hearing in which they said Lawson is
23 working on a design-around. That was all it said. It
24 offered no more detail.

25 THE COURT: Didn't say anything except it was

1 working on a design-around.

2 MR. STRAPP: That was all that was said in their
3 briefing. Now, Mr. McPheeters and Mr. Cohen, you see
4 statements from them here on April 6 and April 13th on a
5 timeline. Those are Lawson's general counsel and another
6 Lawson in-house counsel.

7 Now, the statements in these documents, these are
8 part of the Hager deposition exhibits that were provided
9 to Your Honor which Your Honor hasn't yet ruled on the
10 admissibility of, but I would suggest that they are
11 instructive for the following point: On April 6th and on
12 April 14th, what Mr. McPheeters and what Mr. Cohen advised
13 Lawson was, withhold any press release concerning RQC,
14 retract any statements about the design-around, and the
15 reason given was, quote, these statements may be used by
16 ePlus or the judge to negate any efforts to obtain a stay.

17 That's the motivation in a nutshell for the
18 testimony that was provided by Mr. Hager and for the
19 course of conduct that followed that testimony.

20 I want to direct Your Honor's attention to some
21 of Mr. Hager's testimony at that hearing. On slide 54,
22 Mr. Hager was asked about the costs and the time to change
23 away from RSS, and this was the exchange in which he said
24 at the hearing, it's going to take about nine months, it's
25 going to cost somewhere north of 300,000, maybe 750,000 on

1 average, some will be greater than a million.

2 Now, what Mr. Hager was testifying about with
3 respect to these costs were what costs and what time are
4 associated with ripping out RSS and replacing it with a
5 third-party system.

6 THE COURT: He wasn't asked that. He was asked
7 if he had any idea how much of a cost for a hospital to
8 make a change away from RSS.

9 MR. STRAPP: Right. That morning --

10 THE COURT: He put the construct on it himself in
11 the answer --

12 MR. STRAPP: That's correct.

13 THE COURT: -- about pulling it out and putting
14 something else in.

15 MR. STRAPP: That's correct. And earlier in the
16 same hearing, he was asked a question about --

17 THE COURT: Isn't it fair to interpret the
18 question as going away -- changing away from RSS to mean
19 basically pulling it out and putting it in?

20 MR. STRAPP: It is fair to interpret it that way,
21 and, in fact, it's not only fair to interpret it that way,
22 that's corroborated by the email exchange that he had, Mr.
23 Hager had with Mr. Lohkamp the morning of March 25th.

24 That morning, he sent an email to Mr. Lohkamp,
25 and this is part of the record, asking what's the cost and

1 time -- pick your most complex user, what is the cost and
2 time associated with taking RSS away from that user and
3 switching that user over to ePlus.

4 Now, here's the real question: Was the testimony
5 that Mr. Hager was providing about this cost and time
6 associated with any plans that were in the works at
7 Lawson, or was it just a construct and an artificial cost
8 and time that Lawson never contemplated actually
9 incurring?

10 Well, what Mr. Lohkamp said on the stand, this is
11 at slide 55 -- he said, Lawson -- he was asked, Lawson
12 never had a contingency plan, though, to have its
13 customers rip out RSS and replace with ePlus; correct?

14 Answer: Correct.

15 So when Mr. Hager was asked on March 25th, what
16 are you going to do if the Court enjoins maintenance and
17 support, he could have said two things. He could have
18 said, well, we have a plan in the works to mitigate the
19 harm to our customers. If it works out -- it's still in
20 development -- our customers won't be harmed. They'll be
21 able to just take a download. There won't be any cost,
22 there won't be any time associated with it. But if that
23 plan doesn't work out, it's going to be a really horrible
24 situation. It's going to cost hundreds of thousands of
25 dollars, it's going to take months of time.

1 He didn't say that. He just said, this is what's
2 going to happen, it's going to be terrible, even though
3 that parade of horrors was never even contemplated as a
4 possibility that could happen within Lawson.

5 Your Honor was challenged back in November 2011
6 by Lawson's counsel that this entire line of evidence
7 about the injunction proceeding was irrelevant to the
8 contempt, and Your Honor said, well, it may be relevant to
9 the remedy, because if there were misrepresentations at
10 the time of the injunction proceeding, that can implicate
11 the remedy that's appropriate in this instance.

12 And specifically, Your Honor said, if there were
13 misrepresentations about the length of time it would take
14 to accomplish this and the expense it would require,
15 that's going to inform a remedy here.

16 What I've put here on slide 56 are some of the
17 representations that were made, including the dates on
18 which they were made, and side by side what actually
19 happened with respect to RQC. March 25th, March 30th,
20 April 1st, statements were made by Lawson to Your Honor
21 that it would take nine months on average for
22 implementation, that it could take many months to several
23 years to install, implement, and deploy software, and that
24 this was software that can't be uploaded over the weekend.

25 Less than two months later, or a little bit over

1 two months later, Lawson said internally, Lawson was the
2 first implementation, we went live using our internal IT
3 department in under one day of elapsed time.

4 Your Honor, I'm going to turn briefly to
5 attorneys' fees. Attorneys' fees is governed by section
6 285. Under section 285, the Court has the authority to
7 award reasonable attorneys' fees in exceptional cases. In
8 a patent contempt proceeding, or even in a patent trial,
9 where willfulness is found, several courts have said that,
10 in and of itself, can be a justification for attorneys'
11 fees.

12 THE COURT: If there's no willfulness finding,
13 how can it be an exceptional case?

14 MR. STRAPP: If it's not willfulness, I think I
15 would agree with you that it's not going to be an
16 exceptional case. But if it is willful, what courts have
17 said is a finding of willfulness is a sufficient basis for
18 an award of attorneys' fees.

19 There's obviously a lot more, and some of the
20 reasons why damages should be enhanced are also reasons
21 why attorneys' fees should be awarded.

22 Finally, Your Honor, coercive remedies are
23 appropriate in a civil case insofar as they are only in
24 place until such time as Lawson comes into compliance with
25 the requirements set forth in the injunction. Those can

1 take the form of, for example, a daily or weekly fine or
2 pre-approval requirement, and if Your Honor was inclined
3 --

4 THE COURT: How do we know when they come into
5 compliance?

6 MR. STRAPP: They would submit a statement to
7 Your Honor from their executives that says, we have now
8 complied with every single paragraph --

9 THE COURT: And the first thing that would happen
10 is that you're going to say, well, they haven't proved
11 that. I don't know that that's necessarily going to work.

12 MR. STRAPP: Your Honor, at the time they
13 submitted they were in compliance, you could suspend the
14 fine pending agreement by all parties and the Court that
15 they were in compliance, and if they --

16 THE COURT: Who is the fine paid to?

17 MR. STRAPP: To the Court. Not to ePlus.

18 THE COURT: I argued a case sort of like this one
19 time in front of Judge Merhige, and when I finished, do
20 you know what he asked me? He said, how come you didn't
21 ask for me to hang them? Is there anything else you think
22 I ought to do?

23 MR. STRAPP: Well, I just have a measure of the
24 daily fines that Your Honor could impose if it found it
25 fit, but that is all that I have.

1 THE COURT: That's the daily revenue, the gross
2 profit, or the incremental profits.

3 MR. STRAPP: Those are just measures of fines
4 based on revenues and profits that Your Honor could impose
5 as a daily fine. Thank you, Your Honor.

6 THE COURT: All right.

7 MR. DUSSEAU: Thank you, Your Honor. You know,
8 I know you were joking when you said, how come you didn't
9 ask me to hang them, but I think maybe a good place to
10 start after Mr. Strapp's presentation is to remind the
11 Court of the purpose of a civil as opposed to criminal
12 contempt proceeding which is twofold, and the Court
13 recognized this in the ruling on the motion concerning Dr.
14 Ugone.

15 It is compensatory or coercive. It is coercive,
16 and I believe the parties agree with this, only in a
17 forward-looking sanction that can be readily resolved and
18 taken away by compliance.

19 Otherwise, it is purely compensatory, and what I
20 ask you, Judge, is when you listen to that presentation,
21 the patchwork quilt they are putting together, this kind
22 of crazy quilt of so-and-so said this here, they may have
23 been talking about RQC, they were talking RSS, and
24 somebody said this at this hearing two years later.

25 What I ask you is, are they trying to show you

1 what is a relevant and fair compensatory remedy, or are
2 they trying to get you to punish Lawson.

3 My submission, Your Honor, is that what they're
4 trying to do is get you to punish Lawson, and they're
5 doing it, frankly, through the same kind of smoke and
6 mirrors that Mr. Thomasch talked about earlier today, and
7 it's out of order, but it's kind of so outrageous, I
8 really want to take it first.

9 This point about Mr. Hager, who they've just been
10 bashing on throughout, Mr. Hager, Mr. Hager, and Your
11 Honor asked what I think is exactly the right question
12 which is, what was this point made in the briefs that
13 somebody basically told everyone that this work-around,
14 design-around was being done. I just want to remind
15 everyone of the dates involved here.

16 On March 30th of 2011, Lawson -- while the
17 injunction proceeding was going along, Lawson disclosed
18 that it was working on a redesign of RSS and Punchout to
19 avoid the infringed claimed. That's an exact quote.
20 ePlus then filed its reply injunction brief, and they
21 acknowledged this. They acknowledged that they were aware
22 of that.

23 You then had a hearing. Both parties, both
24 parties, Your Honor, mentioned the design-around, and Your
25 Honor's response was, that stuff, that's not really before

1 me on either side, is it.

2 After the hearing, Your Honor, Lawson submitted a
3 letter, which is docketed at docket entry 727 on May 6th,
4 2011, again disclosing and describing this work-around,
5 and then -- and I think this may be the only piece you
6 need to know, Your Honor. In your injunction ruling, your
7 ruling that had the sunset provision as to health care
8 customers, you reference the work-around, and you mention
9 that in your view, that meant that some of what Mr. Strapp
10 called the parade of horrors was, in your view, not
11 likely to occur.

12 So Mr. Strapp and ePlus are going to stand here
13 today and say that that conduct is willfulness that should
14 lead you to award treble damages and coercive sanctions
15 and attorneys' fees, and let me make one other point
16 that's kind of interesting. At the time of the testimony,
17 was the design change that is at issue in this contempt
18 proceeding even conceived? No, it wasn't.

19 THE COURT: No, but here's the problem I have,
20 Mr. Dusseault. They came in here and ponied up something
21 they knew was not even under consideration. They knew,
22 Mr. Hager knew, Mr. Lohkamp knew, the lawyers knew that
23 that wasn't what they were considering, and they led the
24 Court to believe that that was actually what might have
25 happened, and because of that, I issued an injunction with

1 a sunset provision in it.

2 And I agree -- I think the record shows that if
3 I -- I don't remember the time frame exactly from the
4 testimony, but there was an early-stage look-see at the
5 matter, and then they were trying to do some other
6 options, and the final decision hadn't been made as of the
7 time of that hearing. But that said, what he said was
8 just not right, and it was intended, I think, to get the
9 Court to focus on a way to -- and to focus on the harm
10 that would befall in the event of an injunction, and I
11 think that's the part of it that troubles me
12 notwithstanding the chronology, and maybe you could
13 address that aspect of it.

14 MR. DUSSEAULT: And, Your Honor, I understand,
15 and Your Honor has expressed it before that Your Honor is
16 troubled by that presentation. I would note that nobody,
17 Lawson's counsel, ePlus's counsel, nobody asked questions
18 about is there a redesign. Nobody did on either side. I
19 understand.

20 Now, I understand that that is a source of
21 frustration. We have explained in our briefing why we
22 believe that what Mr. Hager did was answer truthfully the
23 questions that were underway, that works were, in fact --
24 excuse me, that work-around was actually being worked on
25 but yet not finalized. We've explained that.

1 But I think that the ultimate question, Your
2 Honor, is when they're trying to prove -- and they bear
3 the burden of proof, and they're trying to prove
4 willfulness with clear and convincing evidence, that this
5 is what they're giving you. It's willfulness, Your Honor,
6 as to the infringement of claim 26 with a design change
7 that was not conceived at the time of the testimony.

8 So I understand, Your Honor, and you've made very
9 clear your frustration. Obviously, we were not in the
10 case at that time. I understand that.

11 THE COURT: That ought to be made clear on the
12 record, too. I understand that.

13 MR. DUSSEAUT: And the question is, if that's
14 what Mr. Strapp and ePlus are spending five or ten minutes
15 talking to you about today, is this really a case where
16 you ought to be doing what they are asking you to do?

17 And so what I'd like to do if I could -- Mr.
18 Strapp walked through the different remedies that they're
19 asking for. What I'd like to do, because they haven't, is
20 show you what happens when you put them together just very
21 briefly. So if we can have the first slide.

22 Through most of their briefing, and today, I
23 think, is the first time they've done anything different,
24 what they've done is, they've given a remedy number
25 through November 30 of 2012, and then they said, oh, yeah,

1 and there's a daily rate, but they've never multiplied
2 that out to show you what that number would be.

3 Now, they do that in their slide presentation
4 today up to the hearing date. What we've done is we've
5 multiplied out the daily rate to give you the total number
6 were the Court to decide this on July 1 of this year. We
7 picked it just because it's halfway through the year.

8 If you look at this number, Your Honor, you see
9 that their remedy for disgorgement, which is the only
10 choice they've given the Court, ranges from the 17 million
11 at the bottom, which is the one that Ugone really stood
12 behind, and we'll talk about that in detail, all the way
13 up to \$42.7 million.

14 But they don't stop there. They asked for
15 trebling. So what happens if you treble it. The range of
16 damages in this supposedly compensatory proceeding, Your
17 Honor, is 51 million to \$128.1 million. They don't stop
18 there, and if you look at the next step, attorneys' fees.
19 They ask for attorneys' fees, but they don't tell us what
20 the attorneys' fees are. Clearly they know what
21 attorneys' fees they've incurred -- they have a range in
22 the ballpark -- but they don't disclose that number.

23 And then lastly, and they did talk about this,
24 the daily coercive fee. In their briefing, they asked for
25 62,000 per day under any scenario, so that's the only

1 number that we've given.

2 So, again, what I ask Your Honor is when you look
3 at these numbers, and I'm going to walk through the steps
4 that they've gone through to get to these numbers, is this
5 anything even slightly resembling a compensatory remedy.

6 Let me give you a couple of reality checkpoints
7 to check that against, Your Honor. If you look in the
8 record and say how much business have they shown you that
9 they've lost, any evidence, even if they can't prove it
10 with precision, even if they can't prove anything, how
11 much business have they shown you that they've lost as a
12 result of the RQC design change after the injunction? The
13 answer is zero. They made a deliberate strategic decision
14 to make no effort whatsoever to show harm.

15 Your Honor also can refer back to the fact that
16 in the underlying trial, they took the position that five
17 percent royalty was appropriate, and Your Honor struck
18 that as, in fact, too high and unreasonable. Five percent
19 of the total revenue, by our calculation, of \$21.7 million
20 is about a million dollars.

21 But what if you even wanted to get into
22 disgorgement of what Lawson actually earned? So I'm going
23 to talk in a bit more detail about net profits, but what's
24 the real gain to Lawson of making these sales? It is the
25 net profit. It's the money that's left over after all of

1 the costs, Your Honor, that are necessary to run the
2 business. And that figure is \$3.7 million through the end
3 of November 2012 and \$5.5 million up to July 13.

4 So what ePlus is asking you to do today, based on
5 conduct that through July 1st of this year earned our
6 company \$5.5 million of net profit, is to award somewhere
7 between \$51 million and \$128.1 million plus attorneys'
8 fees as a supposedly compensatory sanction. That's
9 inappropriate.

10 Now, what I want to do, having totalled it up to
11 start, Your Honor, is spend a letter bit of time walking
12 through the steps that ePlus uses to get from compensation
13 to something that I would suggest bears no resemblance at
14 all to compensation.

15 The first point is one that we have addressed
16 with Your Honor before which is, is disgorgement even an
17 available or appropriate remedy here, and I want to talk
18 about that very briefly. And Mr. Strapp said that there
19 are very few points on which the parties can agree. I
20 think there's another point that's important that the
21 parties can agree to here which is that ePlus chose to
22 present no evidence of harm, and I want to be really clear
23 when I talk about that.

24 This is not a case, Your Honor, where there's
25 difficulty proving harm and they've presented some

1 evidence, but the defendant is saying, well, you can't
2 prove it with precision. They made a choice, Your Honor,
3 not to make any effort at all to prove that they've lost
4 any business or that they even tried to get the business.

5 But there's something else that they haven't
6 tried to do. They haven't presented any evidence that it
7 would be difficult to do that. They didn't have Mr.
8 Farber take the stand and say, well, I can't really show
9 you what our actual harm is in case you want to use that
10 as a gauge for a compensatory remedy.

11 And interestingly, Dr. Ugone, who we're hearing a
12 lot about today and we'll talk about a lot more, testified
13 under oath that he's not taking the position that he
14 couldn't have measured something like an actual loss.
15 He's done that in 20-plus cases. He's not saying he
16 couldn't have done a reasonable royalty. He's done that
17 in 20-plus cases.

18 They made no showing, and what's even more than
19 that, Your Honor, is that the evidence there is in the
20 record actually shows there is no harm. So if we could
21 look at the slide of Mr. Farber's testimony which we
22 submitted to the Court via designation.

23 THE COURT: What is the number on the slide?

24 MR. DUSSEAULT: Slide 1208, Your Honor. So we
25 put a couple of questions here.

1 Question: Before the injunction entered, was
2 there any form of contingency planning by ePlus as to how
3 ePlus might be able to take advantage of an injunction
4 from a business perspective if an injunction was entered
5 by Judge Payne?

6 Answer: I don't believe so at that point, no.

7 Question: At any time following the May 23rd,
8 2011, entry of an injunction, did ePlus form a strategy to
9 try to take advantage of the injunction from a business
10 perspective?

11 Answer: No.

12 Can we have the second page of the slide?

13 Question: In light of the fact that, as you
14 testified, ePlus had the capability of selling a
15 requisition system to replace RSS with a customer who was
16 otherwise using the Lawson system foundation, did you
17 consider attempting to make direct appeals to Lawson
18 customers to accomplish that?

19 Answer: Before litigation?

20 Question: No, after the date of the injunction.

21 Answer: No. I had mentioned earlier in this
22 deposition that it was ill-advised by me to do so.

23 THE COURT: Is there any testimony as to what
24 ill-advised by me meant --

25 MR. DUSSEAUT: No, Your Honor. I don't know. I

1 don't know what it means. But I think what is absolutely
2 clear, and the only evidence before you is that they
3 didn't take any steps at all to try and win business here.

4 Now, I would submit, Your Honor, and I know we've
5 briefed this, we've had the Ugone briefing, but when a
6 remedy is inherently compensatory in nature and a party
7 makes a strategic gambit to just not give Your Honor any
8 evidence, can you award anything as a compensatory remedy,
9 or have they failed to meet their burden of proof?

10 I understand that there's a disagreement, Your
11 Honor. We take the position under controlling case law,
12 including Supreme Court precedent, that any compensatory
13 remedy must be based upon proof of actual harm. You ruled
14 in the Ugone ruling that in the case of disgorgement, that
15 may not be necessary.

16 Now, the difference here, I would submit, is the
17 total strategic decision to present absolutely nothing,
18 again, without any showing that there was a difficulty in
19 doing it, and if you award the remedies that they're
20 asking for here, Your Honor, this will be a case that will
21 go up on appeal, and the question will be, is it an
22 appropriate compensatory remedy to award what may be
23 millions of dollars if ePlus has its way, tens or hundreds
24 of millions of dollars where there was a complete and
25 deliberate absence in the record of any harm, and I would

1 submit, Your Honor, that that is not a compensatory
2 remedy. But even if it's available as a matter of law,
3 Your Honor, even if the remedy is available, it is not an
4 appropriate remedy here.

5 Now, I think there's another point that we can
6 all agree on. ePlus chose to give you just one choice of
7 remedy. They chose to give you just one which is
8 disgorgement, and Mr. Strapp says, well, there's cases
9 that have done it. There's some cases that have done it.

10 Of course, that doesn't show that it is, in fact,
11 the appropriate remedy, and, again, when Dr. Ugone, a
12 Ph.D. economist, took the stand, did he say, I think this
13 is an appropriate remedy? No, he did not. He said, the
14 lawyers told me to assume that it was an appropriate
15 remedy in this case.

16 Now, it is, Your Honor, a rarely used remedy in
17 the context of patent contempt cases. It is an extreme
18 remedy, and we cited to Your Honor a law review article by
19 John Golden in the Texas Law Review in which he says,
20 quote, disgorgement of the entirety of a contemnor's
21 profits appears to be considered an extreme remedy
22 reserved for egregious behavior, but it's the only option
23 ePlus has given you here.

24 THE COURT: Are you saying that you can't -- it's
25 inappropriate here because they first have to show, before

1 a court can resort to disgorgement, that a remedy based on
2 actual loss is difficult or unsusceptible of proof?

3 MR. DUSSEAULT: I would make two points, Your
4 Honor, and they are in two steps. Where a party fails to
5 present any evidence of the fact of harm, the fact of
6 harm, not just the amount but the fact, and there is no
7 evidence that they could not have done so, that to --

8 THE COURT: Could not have produced the evidence?

9 MR. DUSSEAULT: Yeah. If they come in and say,
10 here's why we're unable to prove it or unable to prove it
11 with some certainty, that would be different than the
12 scenario we have, but I would submit that it is not
13 available in the utter absence of such proof, but the
14 second point I was making is that it is inappropriate in
15 that it is an extreme remedy, and it is rarely used.

16 It is not used in any of the *TiVo* cases that the
17 parties agreed on and submitted to you in a list. You
18 will not find one of them that gives disgorgement. There
19 are to this day cases that are being decided that are not
20 awarding this, are awarding much more commonly lost
21 profits or reasonable royalty, and we've cited to Your
22 Honor the *Walman* case, and I want to just point that out
23 very briefly.

24 This is a case that came out after the briefing
25 on the *Ugone* decision, and it's one of the cases that the

1 parties agree is a post-*TiVo* case applying that standard.
2 Here, the Court takes the position that the Court notes
3 that there appears to be a split authority over whether a
4 contemnor's profits may be the proper measure of
5 compensation in a civil contempt proceeding. And then
6 they go on and say -- they do note that disgorgement was
7 not specifically requested in that case, and they say,
8 therefore, we don't have to reach the issue, but they do
9 say in the second highlighted passage, but as noted above,
10 compensatory damages must be based upon evidence of the
11 complainant's actual loss.

12 Before I move on from this point, Your Honor,
13 there's one other thing I want to bring up that I don't
14 think any party has yet raised with the Court, and that
15 is, what is the Fourth Circuit's standard for civil
16 contempt, and so we can go to the Ashcroft slide.

17 THE COURT: Do we use the Fourth Circuit law, the
18 regional circuit, for contempt, or the law of the Federal
19 Circuit when it's contempt of an injunction that was
20 issued by virtue of patent infringement?

21 MR. DUSSEAULT: Your Honor, my understanding is
22 that because the contempt procedure is not unique to
23 patent law, you follow the Fourth Circuit's contempt
24 procedure. That is my understanding.

25 And the Fourth Circuit standard, if you see,

1 says, to establish civil contempt, each of the following
2 elements must be shown by clear and convincing evidence,
3 and the fourth element is that the movant suffered harm as
4 a result.

5 So I would submit, Your Honor, that in the
6 absence of proof of harm, if, in fact, it's correct, as I
7 believe, that the Fourth Circuit standard controls, they
8 have not established liability let alone a remedy for
9 contempt in this case.

10 So our position, Your Honor, as stated in the
11 briefs, is that because they took a gamble and chose to
12 give you just one option, and it's an option that I
13 believe is unavailable under the law, but even if
14 available is used only very rarely, that having taken that
15 gamble, if Your Honor decides it's an inappropriate
16 remedy, it is entirely appropriate to award nothing.

17 And I would submit, Your Honor, remember, Dr.
18 Ugone was the witness in the *TiVo* case, and in the *TiVo*
19 case he actually gave the Court multiple options. And
20 what happened there was that the Court looked at multiple
21 options and said, no, disgorgement of profits as proposed
22 by Dr. Ugone is unreasonable and punitive. And, instead,
23 they awarded a reasonable royalty. It was enhanced.

24 Now, ePlus says in its brief that somehow that
25 enhancement is a disgorgement. I would simply note that

1 nobody has ever taken that position but ePlus. That's not
2 described as profit disgorgement in the decision. In
3 fact, what the decision does is reject profit
4 disgorgement.

5 So our position is that disgorgement is not
6 appropriate, but what if the Court wants to give a
7 disgorgement remedy here? The question then becomes, what
8 is the reasonable compensatory measure of that award under
9 the facts and circumstances. So what I'd like to do is
10 take sort of the measurement and number issues first and
11 then get into some of this enhancement discussion that
12 they turn to.

13 So let me try and take these questions in order.
14 The first which we address is agreeing on the revenue
15 base, and I do agree with Mr. Strapp. The only two
16 disputes are should you allocate or apportion for LSF and
17 process flow revenues, and should you be counting revenue
18 to health care customers.

19 So let's take LSF and process flow first. Now,
20 as we established at trial through Dr. Ugone, this is
21 something that Dr. Ugone proposed. He proposed it as
22 potentially appropriate. I admit, he said it's not
23 mandatory, but his reasoning, which he brought up, is that
24 LSF and process flow is the foundation for configuration
25 three and four but also for many, many, many other

1 modules.

2 And he devised a methodology that calculated that
3 85 percent of that revenue is properly attributed to other
4 modules. Dr. Putnam weighed in and looked at this and
5 said, yes, this seems to be appropriate.

6 THE COURT: You don't quarrel with the allocation
7 of 1585.

8 MR. DUSSEAULT: We do not. We embrace it. We
9 believe it's correct. What's interesting is ePlus
10 quarrels with it. Not the percentage, but ePlus is trying
11 to run away from it, and what I think is interesting -- if
12 we could put up a slide of Dr. Ugone's testimony, when
13 they say, well, Dr. Ugone said that it was optional, I
14 want to look at the reason he did it. And this is -- I
15 was reading impeaching testimony to him, Your Honor,
16 during the proceeding, and this is what it said.

17 Let me read this testimony to you, sir.

18 Question: Now, in an effort to make sure you're
19 using the right revenue base, you propose two
20 apportionments in your analysis; correct?

21 Answer: Yes.

22 Did I ask you that question and you gave me that
23 answer?

24 Yes, and I still stand by that answer.

25 Now, the two apportionments that he made, and he

1 stands by this position, he made them to make sure we're
2 using the right revenue base, include LSF. They ought not
3 be permitted to run away from that, and I would warn Your
4 Honor their brief and slides today are loaded with figures
5 that don't make Dr. Ugone's LSF apportionment. So if
6 you're giving an award of any kind, you have to be very
7 careful that you use the number that has two
8 apportionments and includes LSF.

9 The second issue I think is pretty easy which is
10 health care customers --

11 THE COURT: The two apportionments is the large
12 suite apportionment and the LSF.

13 MR. DUSSEAUT: Yes, Your Honor, that's correct.
14 The second one, the second --

15 THE COURT: That is in the briefs, isn't it?

16 MR. DUSSEAUT: It is.

17 THE COURT: Well, it's in your brief.

18 MR. DUSSEAUT: Well, they have -- what they do
19 in their brief, Your Honor, is they have a big grid on the
20 pages that gives the no LSF apportionment number, and then
21 they drop a footnote usually and say, if you do LSF --

22 THE COURT: Okay.

23 MR. DUSSEAUT: The other one is health care
24 customers, and I think this one is pretty straightforward,
25 and I think because it's straightforward, ePlus tends to

1 overstate the issue here a bit.

2 These are not new licenses to new customers.
3 That's not what's at issue, and I think both experts agree
4 on this. What's at issue here is licensing revenue when
5 one of the specifically identified customers, health care
6 customers, says, hey, you know what, we've had five people
7 leave, and I need five new licensees because new people
8 are coming in, or, we're growing our department a little
9 bit, so to meet the need I need five more licenses.

10 THE COURT: Well, they argue licenses. It's not
11 a situation where there was an agreement reached and then
12 the payment occurred later. They are licenses that were
13 granted after the date of the injunction, but they are to
14 extant customers who are expanding the number of licenses.

15 MR. DUSSEAULT: Yes, Your Honor, or just
16 changing. My understanding of how it works is, if your
17 lineup of employees changes, you may need to get a new
18 license to be compliant, and you do that. That's the
19 revenue that we're talking about here.

20 So Your Honor, obviously, is in the best position
21 to know what Your Honor meant in granting this provision,
22 but ePlus's position seems to be the moment a health care
23 customer gets to the point where it needs to add some
24 licensees, it would either have to immediately replace
25 Lawson or use two different systems.

1 THE COURT: There wasn't any testimony, if I
2 recall, at the trial about that contractual necessity to
3 have a new license if you were expanding the number of
4 users in your company. Do you know whether there was such
5 testimony as that?

6 MR. DUSSEAUT: Your Honor, there was definitely
7 testimony from Dr. Ugone, because I asked him about this,
8 about whether the issue here would be that they would
9 treat as improper the addition of a customer -- of a user
10 for an existing customer, and he said yes. That's what we
11 need, not fact testimony about it happening, but I don't
12 think there's any disagreement, Your Honor, that that's
13 what's making the adjustment for an existing health care
14 customer.

15 THE COURT: Well, I was going back to your
16 statement that we ought to focus on what was intended by
17 the injunction as to whether or not the issuance of a
18 license of this sort was a violation of the injunction,
19 and to that extent I expect we should. Does anybody put
20 on any evidence about this kind of licensing being extant
21 in the trial record?

22 MR. DUSSEAUT: In the underlying trial record, I
23 can't speak to that.

24 THE COURT: I don't remember, but there's a lot I
25 don't remember.

1 MR. DUSSEAUT: So that's an adjustment that we
2 believe their reading is not reasonable, but, again, Your
3 Honor is in the best position, and that would be a
4 reduction of Dr. Ugone's revenue base of about 900,000.

5 So then the question is, once you have the
6 revenue base, what's the right profit margin to use, and
7 Mr. Strapp said, well, you should use gross profits
8 because everybody agrees on it, everybody agrees on the
9 measure, but what is interesting is there's another thing
10 that everybody agrees on, and that's that gross profit is
11 not the best measure of gain.

12 We testified to that through Dr. Putnam, and
13 ePlus testified to that through Dr. Ugone, and what I'd
14 like to do is put up Dr. Ugone's testimony, because I
15 believe that Mr. Strapp mischaracterized what he was
16 saying. You may recall that Mr. Strapp's explanation was,
17 sure, Dr. Ugone said this, but he was talking in terms of
18 economic principles, not about the facts and circumstances
19 of this case.

20 But look at the context of the question and
21 answer. It was my question, and I said, Question: And
22 gross profit is not the correct measure of Lawson's gain
23 as you defined it; correct?

24 Answer: There are some incremental costs that
25 can be deducted.

1 And then you intervened, said, just answer the
2 question yes or no. I think the bottom line, though, is
3 in your judgment, is the correct way to equate your
4 figures with the gain the incremental profit?

5 The Witness: Yes.

6 He was not talking, Your Honor, about esoteric
7 principles of economics. He was talking about the figures
8 that he offered the Court, and what he told you was that
9 the best measure of gain is incremental.

10 Now, they can't run away from that testimony fast
11 enough, but I would submit that if you were to use a
12 number offered by ePlus, it needs to be the only one that
13 their witness has endorsed.

14 Now, then the question becomes, if you use an
15 incremental measure, which incremental measure should you
16 use, Dr. Ugone's or Dr. Putnam's. And there's really only
17 one difference between the two.

18 THE COURT: Excuse me a minute. As opposed to
19 the incremental, it looks to me like actually the dispute
20 here may be that if you assume the gross profits is not
21 the proper or best measure but that you use net profit,
22 there's a dispute with respect to whether you have
23 established that which is necessary to be deducted to
24 reach properly net profits given that Dr. Putnam takes one
25 view of the matter and Mr. -- what is the CFO's name?

1 MR. DUSSEAULT: Kevin Samuelson.

2 THE COURT: Mr. Samuelson gave different
3 testimony, and that ties into the meaning of fixed and
4 variable, and all of that focuses on meaning fixed and
5 variable costs. So it looks to me as if the bottom line
6 point that they're making is that net profit would be okay
7 and probably proper if I had -- if you had carried your
8 burden to establish what one deducts from gross to get to
9 the net, but you haven't. Therefore, I should use the
10 gross. I think that's what their point is.

11 MR. DUSSEAULT: It's wrong for a number of
12 reasons.

13 THE COURT: Why isn't that right?

14 MR. DUSSEAULT: Well, first of all, you shouldn't
15 jump to gross, because their own expert has said that
16 gross isn't the correct measure of gain. If the purpose,
17 as everyone has assumed, of disgorgement is to disgorge
18 gain, then Your Honor ought to disgorge the best measure
19 of gain, and Dr. Ugone said it's not gross.

20 The reason that it's not appropriate is, just as
21 one example, gross includes sales commissions. There's no
22 question that if Lawson is selling modules, configurations
23 with RQC that it's paying a sales commission and that in
24 order to earn that revenue it had to spend that variable
25 amount of sales commission. Gross doesn't deduct that.

1 THE COURT: He's willing to take off all the
2 sales and marketing, isn't he?

3 MR. DUSSEAULT: Only in his incremental number.
4 The gross number that they're advocating does not take off
5 sales and marketing.

6 THE COURT: But the number that you would take
7 off of gross, at least the figure that you all agree on as
8 to sales and marketing, is in the record, isn't it?

9 MR. DUSSEAULT: It is, Your Honor.

10 THE COURT: Could I make that calculation, or is
11 there nothing on which I could make that calculation?

12 MR. DUSSEAULT: I don't think you need to make
13 the calculation, Your Honor, because that is Dr. Ugone's
14 incremental figure. Dr. Ugone's incremental figure is
15 gross profits minus 100 percent of sales and marketing.
16 That's what he's calling incremental.

17 So you don't need to make that calculation.
18 That's the incremental number that ePlus is now saying is
19 not the best number. But what I was trying -- I'm sorry.
20 I'll try and slow down.

21 What I was starting to say with respect to
22 incremental is what Dr. Ugone does is he treats sales and
23 marketing as 100 percent variable. So the only difference
24 between his gross figure and his incremental is that he
25 takes out sales and marketing as he clearly must.

1 THE COURT: So his figure is really a net
2 figure -- his incremental figure is really a net profit
3 figure of sorts. But it's not as complete as you think it
4 ought to be.

5 MR. DUSSEAULT: I wouldn't call it net, Your
6 Honor. I would call it -- it's sort of gross minus. It's
7 really very, very close to gross with one adjustment. I
8 won't dwell a lot -- we've briefed this, I think, to high
9 heavens, but the parties took different approaches in
10 figuring out what variable costs should come out of
11 incremental. Dr. Ugone relied on a couple of sound bites
12 from depositions, and what we relied on was a regression
13 analysis of 11 years of data which showed that these
14 categories of costs were 89 percent variable, and that was
15 then double checked and confirmed against the
16 contemporaneous testimony of Mr. Samuelson who is the CFO
17 who estimated that, in his view, the costs were between 85
18 and 90 percent variable. They came to the same answer.

19 THE COURT: Doesn't that depend ultimately on the
20 length of time in which you assess whether a cost -- that
21 you use to assess whether a cost is variable or not?

22 MR. DUSSEAULT: Well, our position, Your Honor,
23 is that one of the several reasons that net profit is the
24 better measure here, and one that's used repeatedly by
25 courts, and we have cited in defendant's proposed findings

1 of fact 603 and 604 to numerous cases that have used net
2 profit as the correct measure of disgorgement.

3 One reason that it's appropriate is that it
4 includes the costs that it really takes to sell the
5 products and run the business. That's the true cost. But
6 another is that when you are looking at a longer period of
7 time, more things are variable.

8 So one may say, you know, instantly a given cost
9 is fixed or it's not going to vary within a week, but is
10 it going to vary over the course of a year, or is it going
11 to vary when the decision that Lawson is actually making
12 is, we're facing the loss of \$21.7 million of revenue over
13 the next year and a half, let's start cutting costs.

14 They wouldn't limit their cost-cutting, Your
15 Honor, to the costs that are instantly variable. They
16 would be able to vary some that were longer as well. So,
17 Your Honor, the net profit, we would submit, is the
18 appropriate measure, and the measure of net profit, if you
19 take it out to July 1 of 2013, is \$5.5 million.

20 I will dwell on this very, very briefly, Your
21 Honor, because I do want to get to the enhancement points
22 during the time. There's a point that we've made in our
23 brief that I think is very important which is that if Your
24 Honor decides to disgorge, the assumption by ePlus is that
25 you should disgorge 100 percent of the revenues from

1 configurations three and five.

2 We submit that that is wrong for two reasons, and
3 I think both reasons are very sound, although I think they
4 have been misunderstood or mischaracterized by ePlus.

5 One is that compliance with this Court's
6 injunction in light of the Federal Circuit's decision does
7 not require ePlus to sit on the sidelines and forfeit all
8 revenues from customers with configurations three and
9 five. The most that it requires is to refrain from doing
10 business with them as to Punchout.

11 You would have to not sell Punchout, to somehow
12 find a way to deactivate that, and there's evidence in the
13 record that before a design-around was arrived at, Mr.
14 Hager and others were contemplating and planning to do
15 exactly that.

16 So the world in which ePlus complies with the
17 injunction if Your Honor finds that we haven't complied
18 through RQC is not one where they have to leave all
19 revenue on the table, walk away from a customer. It is
20 one where they could continue to do business as to the
21 various other modules as long as they don't do business as
22 to Punchout and they take Punchout out of the equation.

23 The other measure that we offered is if you try
24 and look at the value that customers are paying, the
25 incremental value of getting to do claim 26, you can look

1 at what they pay for a configuration three, for example,
2 versus the cost of the modules that make up two.

3 Now, we are now saying that Punchout is the only
4 infringing piece here. We're not saying that. We
5 understand that it works collectively as a system, but
6 what we have said, and I think it's absolutely correct, is
7 that you can discern the extra value of getting to
8 practice claim 26 by looking at the extra amount that they
9 paid.

10 So if you look at the slide that's up here on the
11 screen, Your Honor, our net profit calculation, if you
12 were to take it out to July 1 of 2013, is \$5.5 million. I
13 would submit that is what we actually earned, and Your
14 Honor raised, and I want to be sure I address it, the
15 argument that we've somehow not met our burden of proof.

16 THE COURT: Excuse me. This 5.5 million on
17 number 1213 is based on only what it would take to
18 practice claim 26 and not the underlying configurations.

19 MR. DUSSEAUT: No, Your Honor. I want to
20 clarify that. The \$5.5 million figure is net profit on
21 all license, service, and maintenance revenue for
22 configurations three and five.

23 THE COURT: Including everything that's in
24 configuration five.

25 MR. DUSSEAUT: Yes, Your Honor, including all

1 the other modules.

2 THE COURT: Then what about -- what is the figure
3 that you are proposing for just what you -- you are saying
4 if you leave out the bottom two components on the chart.
5 It's actually more than two, but it's LSF and process
6 flow.

7 MR. DUSSEAUT: No, Your Honor. If you leave
8 out -- the net profits on incremental values -- if you are
9 basically saying the incremental price that they pay is
10 the price they pay for Punchout and EDI, that's the extra
11 price versus a configuration two, that's 1.2 million
12 through November 30th of 2012 and 1.8 million through
13 July 1st of 2013.

14 If you were to say the only thing that they have
15 to do to comply with the injunction is forego dealings
16 with customers on Punchout, forego revenues from Punchout,
17 that's the next figure, 1 million or 1.4 million, and then
18 the final figure, Your Honor, because I do want this to be
19 very clear, the final figure is Dr. Putnam's adjusted
20 incremental profits on configurations three and five.
21 That's 8.4 million through July 1 of 2013, and that's all
22 license, maintenance, and service revenue for three and
23 five using the incremental number.

24 The one point I want to respond to before I go
25 to the --

1 THE COURT: "Using the incremental number"
2 meaning paying only for Punchout with EDI.

3 MR. DUSSEAULT: No, Your Honor. I don't think --

4 THE COURT: The line net profits on incremental
5 value, 1.2 million and 1.8, is using Punchout and EDI
6 only.

7 MR. DUSSEAULT: Can I try it this way?

8 THE COURT: Am I right or wrong?

9 MR. DUSSEAULT: I think that's wrong. Can I try
10 it this way?

11 THE COURT: Yes.

12 MR. DUSSEAULT: The top entry, net profits on
13 configuration numbers three and five and incremental
14 profits on configuration number three and five are both
15 for all the modules in configuration three and five.

16 THE COURT: Both the top two levels.

17 MR. DUSSEAULT: The top line, net profits on
18 configuration numbers three and five and the bottom line,
19 incremental profits on configurations three and five,
20 those are on all modules in those configurations. The
21 only difference between those two numbers is one uses an
22 incremental profit margin, and one uses the better, more
23 reliable net profit number.

24 And then the middle two lines, Your Honor, are --
25 the second line, net profit on incremental value is

1 essentially what the customers paid for Punchout and EDI,
2 and the third line is net profits on what the customers
3 pay for Punchout only.

4 THE COURT: So the second line is Punchout and
5 EDI.

6 MR. DUSSEAULT: Correct, and the third line is
7 Punchout only.

8 THE COURT: Okay.

9 MR. DUSSEAULT: The one final point before I move
10 to the add-ons, because Your Honor specifically raised
11 this --

12 THE COURT: Excuse me. For the record, you are
13 talking about on 1213.

14 MR. DUSSEAULT: Yes, on slide 1213. Your Honor
15 mentioned that ePlus has argued that we failed to meet our
16 burden to show, under a net profit measurement, what costs
17 should come out, and I do not believe that's correct, and
18 we put on --

19 THE COURT: You don't believe they argued that?

20 MR. DUSSEAULT: I'm sorry. They do argue it. I
21 don't believe it's a correct position, Your Honor, for the
22 following reasons: Mr. Samuelson testified, I think, very
23 directly and very candidly. He said, look, we, like most
24 companies in this business, do not specifically track, you
25 know, a cost to all 4,000 of our SKUs. We don't do that.

1 Here is our overall companywide costs, and I have looked
2 at this, and these products are -- the words he used were
3 middle of the road, typical, mainstream products of the
4 company, and he explained in his testimony that some
5 products require more costs, especially the newer ones.
6 Other products that are at the end of their life require
7 less cost support.

8 His testimony was that these products are up the
9 middle, typical products of the company. So his view was
10 that the most reasonable way to look at this is that these
11 products draw on the costs to the same extent as the other
12 typical products of the company, and that's a reasonable
13 way to look at it.

14 And the case law doesn't require, Your Honor,
15 that you get into this in some minute detail and
16 specifically track every cost directly to the product. In
17 fact, I would submit you cannot do that with overhead.
18 Overhead, by definition, is not for a particular product,
19 but it is a very different question --

20 THE COURT: It's often allocated by divisions or
21 by subsets within a company.

22 MR. DUSSEAUT: It could be allocated, absolutely
23 right, but it is not specifically tracked saying, well,
24 this is the air-conditioning for this group. It's not
25 tracked in that way, but what Mr. Samuelson said under

1 oath in this proceeding is that those costs benefit these
2 products to the same extent as they benefit any other
3 typical products within our company, and they are
4 variable.

5 THE COURT: Right, but in assessing the
6 reliability of that statement applied to Lawson's
7 structure, there's no testimony that I'm aware of that
8 Lawson allocates it by division that would -- or by
9 service that -- or in any way that would permit one to
10 determine what is appropriate to a particular line of
11 products, and so what he's doing is saying now it's
12 appropriate to take the overhead that he's used for the
13 entire company even though you are only talking about a
14 small component of it, and they are saying, that isn't
15 enough to carry the burden of proof.

16 You can't -- I guess that ultimately you can't
17 carry it ever, according to their theory, simply because
18 you don't allocate it that way.

19 MR. DUSSEAUT: Their position would be that
20 software companies, for example, can never get the benefit
21 of this, and if that just means they get overcompensated,
22 so be it. I don't think that's what the cases require.
23 They don't say that only companies that specifically
24 allocate it can recover it.

25 We have presented evidence showing how those

1 costs actually benefit and support, and one confusion that
2 I think they've raised is there's a suggestion in their
3 brief that we're taking all the overhead costs and somehow
4 lumping them with configurations three and five. That is
5 incorrect.

6 What we're doing is we are taking the overhead
7 costs in proportion so the percentage that you get when
8 you look at total companywide costs versus total
9 companywide revenues, and you apply it to what Mr.
10 Samuelson testified are mainstream, up-the-middle
11 products, and his testimony --

12 THE COURT: Proportion to what?

13 MR. DUSSEAUT: The cost that's being incurred in
14 proportion to the overall revenues of the company. That's
15 how the calculation is made at the companywide level, and
16 what Mr. Samuelson says is, if you apply the same
17 percentage, the percentage that is spent on overhead costs
18 companywide is a reasonable percentage to apply to the
19 specific products, because they are mainstream,
20 up-the-middle products.

21 There's no question, Your Honor, no one would say
22 that audits don't relate to or benefit or enable us to
23 sell configuration two. Nobody is taking a question that
24 that isn't the way the company looks at it. ePlus just
25 wants to say, well, in this case, because it's

1 configurations three and five at issue, we want to carve
2 out something there and say they're not going to get those
3 costs.

4 THE COURT: I think maybe you may be at the end
5 of your time here.

6 MR. DUSSEAUT: I am, and I apologize. I really
7 want to spend a little bit of time on the add-on
8 issues which I think are important.

9 THE COURT: You mean the enhancements?

10 MR. DUSSEAUT: Yeah, the enhancement issues.

11 THE COURT: Well, I have to give him extra time.
12 We've been at this since, what, two o'clock? Do we need a
13 break?

14 How much longer are you going to take so he can
15 plan his? I also have a conference call I need to deal
16 with.

17 MR. DUSSEAUT: No more than 15. I'll try to
18 keep it to ten.

19

20 (Recess taken.)

21

22 MR. DUSSEAUT: Thank you, Your Honor. What I'd
23 like to do is, as we turn to the remedies beyond the
24 disgorgement and the issue over whether ePlus is entitled
25 to disgorgement, I want to pause and talk about this issue

1 of willfulness, and then I'm going to address treble
2 damages, attorneys' fees, and the coercive fine.

3 Mr. Strapp rightly puts great emphasis on
4 willfulness, because I think without proof of willfulness,
5 they don't recover, frankly, any of the remedies that
6 they're seeking. And we pointed out the disgorgement is,
7 itself, a rare remedy. There is a finding of willfulness
8 in virtually every patent case that has awarded
9 disgorgement. It is an extreme and rarely given remedy,
10 and there is a finding of willfulness in virtually every
11 such case.

12 So I would submit that willfulness is not only
13 essential to treble damages, attorneys' fees, and coercive
14 fine, but even to disgorgement. But the bottom line, Your
15 Honor, and I think Mr. Thomasch hit on this very
16 effectively earlier today and I don't want to revisit it,
17 is that there is simply no basis here whatsoever to
18 conclude that what Lawson did constitutes a willful
19 violation of this Court's order. It's that simple.

20 What does the evidence show? The evidence shows
21 that when Your Honor issued an injunction, Lawson went to
22 work trying to find a design-around. Now, Your Honor has
23 raised in earlier argument about the Ugone motion the
24 issue of they're trying to deter parties from willfully
25 violating courts' orders. There is no policy that would

1 favor a party being deterred from trying to work around an
2 existing patent so that they could continue to serve their
3 customers. That is a legitimate activity, and it's an
4 entirely appropriate way to respond to Your Honor's
5 injunction, and that is what we did here, and we did it
6 with considerable effort.

7 THE COURT: It's actually an encouraged activity.

8 MR. DUSSEAULT: It is encouraged. Absolutely.
9 And there is absolutely no basis to use a measure of
10 damage or a coercive fine or trebling that would be
11 intended to somehow discourage that. That is exactly what
12 we should try to do.

13 So what did we do? We went back to work and
14 looked for ways to design around the patent, and what we
15 did, what Lawson did, was Lawson changed features of the
16 product that had been focused on in the trial and that
17 seemed to be significant and important, and it took away
18 those capabilities.

19 There is simply nothing in the record, Your
20 Honor, nothing at all, to suggest that the people you
21 heard from, Mr. Christopherson, the other witnesses who
22 testified, were somehow part of some secret plan that we
23 all knew, yeah, we're just violating the Court's
24 injunction, let's pretend we've worked around it.

25 The evidence shows that they tried to and

1 believed they had designed around claim 26 by making the
2 two changes at issue here. That's what the evidence
3 shows.

4 THE COURT: They rely heavily on the statements
5 of people who are employees who basically say, well, this
6 isn't much of a change and it really is nothing
7 significant, but I'm not allowed to say that, and things
8 like that to point out that, in fact, what was going on is
9 that they knew good and well that this effort for -- or
10 what they called a design-around was a charade, in
11 essence; isn't that what the theory is in their briefs?

12 MR. DUSSEAULT: That's the theory that I referred
13 to earlier as smoke and mirrors, Your Honor, and because
14 it's based in predominant part on documents that are
15 talking about features of RQC and the products other than
16 the change that's at issue. It's smoke and mirrors.

17 They've gone through all of our documents,
18 they've gone through thousands of privileged documents,
19 Your Honor, and they find a couple documents, and without
20 discerning whether, is this customer one of the 146
21 customers who have these configurations, is this talking
22 about the claim 26 change versus some other change, they
23 just stick them up in front of you and say, doesn't this
24 look bad, doesn't this look bad, and, Your Honor, as Mr.
25 Thomasch said earlier today, and he's absolutely correct,

1 that is not clear and convincing evidence.

2 I don't dispute that's their theory. That's the
3 horse they're riding, Your Honor, but that is not clear
4 and convincing evidence.

5 Let me give -- I don't think in the time allowed
6 I can go through all the examples that Mr. Strapp did, but
7 he uses as an example this -- the documents -- let me find
8 it here, Dale Christopherson, and he focuses on this and
9 says, well, Dale Christopherson received a communication
10 from a lawyer suggesting a change, and that wasn't done so
11 that's bad faith.

12 If you look at that document, it's just one
13 example, Your Honor. It's one member of the trial team
14 floating what is proposed as an early concept idea, and
15 it's suggesting a change that would require us to dictate
16 to Punchout partners, third parties, what they do.

17 Mr. Christopherson responds that technically
18 that's not a feasible thing to do. Is that bad faith? Is
19 that clear and convincing evidence, Your Honor, of a
20 deliberate desire to violate this Court's injunction?
21 Absolutely not. They've got all our privileged documents.

22 I don't believe that you can take anything that
23 any lawyer proposes and say, if you don't do every single
24 one of them, no matter how preliminary, no matter how
25 early, that that's somehow evidence of bad faith, and

1 where in those piles of privileged documents are the
2 documents saying, you know, obviously this doesn't get
3 around the patent, but let's just kind of dress it up.
4 There's no documents like that Your Honor. None.

5 The evidence shows that we believe this, and we
6 go through these facts, and I would just defer to this:
7 In the proposed findings of fact, which is, obviously, a
8 very long document, we go through each of the misuses of
9 evidence and show why it's a misuse, but this is not a
10 case, Your Honor, of willfulness or bad faith conduct.

11 So with that in mind, let me take each of these
12 additional remedies that ePlus is asking you to add on to
13 the already unusual remedy of disgorgement. The first is
14 trebling, treble disgorgement, and I think my point here
15 can be very simple. I'm not aware of a case --

16 THE COURT: Is there any case that holds you can
17 treble disgorgement as opposed to trebling damages?

18 MR. DUSSEAUT: Certainly not in the patent
19 context, Your Honor, and I haven't seen one, frankly, in
20 any context, but it's particularly inappropriate in the
21 patent context, because it's not a remedy that's
22 available --

23 THE COURT: So if disgorgement is intended to
24 deprive one of gain, and that's a compensatory approach,
25 then trebling the gain is creating a windfall for the

1 other side and smacks of being punitive is your argument.

2 MR. DUSSEAULT: Absolutely.

3 THE COURT: I understand that.

4 MR. DUSSEAULT: And any sort of --

5 THE COURT: Actually that's not right. It's not
6 smacks of being punitive, it is punitive.

7 MR. DUSSEAULT: It is punitive, Your Honor, and
8 the bottom line point is the one you went to first. There
9 is not a single case cited by either party where a court
10 has, in a patent contempt proceeding, awarded disgorgement
11 and then multiplied it. None. None, Your Honor, that
12 have ever done that, and nobody cites to it.

13 And multipliers are under the law reserved for
14 flagrant contemptuous conduct, obnoxious conduct. These
15 are the phrases that are used. It is not intended where a
16 party tries to design around a patent, and if the Court
17 concludes that's what happened, falls short or doesn't
18 succeed in the design-around.

19 I would also add, before moving on from trebling,
20 is that many of the decisions say, well, I think there's
21 willfulness, there could be a basis here to multiply, but
22 I'm not going to, because I'm awarding a remedy that I
23 think is sufficient for compensation, and I would submit,
24 Your Honor, if you actually are going to disgorge profits,
25 in the absence of any proof of any effort to make these

1 sales post injunction, that is more than enough
2 compensation, and this is the last case, Your Honor, where
3 an enhancement of trebling or doubling or even adding some
4 fraction would be appropriate.

5 Now, attorneys' fees, this is a fascinating one
6 to me.

7 THE COURT: A predicate for attorneys' fees is
8 also a finding of willfulness, I think, Mr. Strapp said.
9 That's what makes it an exceptional case here.

10 MR. DUSSEAUT: That's right, but here's what's
11 interesting, Your Honor. As the authority for this, he
12 relies on the Patent Act and says, well, the standard that
13 we should apply isn't contempt proceeding law but the
14 Patent Act, but under the Patent Act, disgorgement isn't
15 even allowed.

16 They are mixing and matching remedies here, Your
17 Honor, where they say when it comes to the disgorgement
18 remedy, which is the only choice they're giving you, the
19 Patent Act doesn't control, it's general contempt law, but
20 for this standard they want to say this comes from the
21 Patent Act, and I would say you cannot draw from the fact
22 that the Patent Act -- the way it allows attorneys' fees
23 when there is a lesser measure like a reasonable royalty
24 that's given, that you can necessarily translate that
25 here.

1 There is, in fact, a Fourth Circuit standard that
2 has been established for when attorneys' fees are
3 available in a contempt proceeding, and if we can put up
4 the slide -- Your Honor, this is the *Omega World Travel*
5 case, and it's a fascinating case. It's an appeal from a
6 very thoughtful decision by Judge Merhige where he walks
7 through the circumstances under which attorneys' fees can
8 be provided.

9 And that goes up on appeal, and this is what the
10 Fourth Circuit says: In exercising that discretion, its
11 discretion to give or not give attorneys' fees, a court
12 may assess attorneys' fees as part of the fine to be
13 levied on the contemnor for willful disobedience of a
14 court order, and then if you go down to the next
15 highlighting, what the Fourth Circuit has held is a
16 contemnor's refusal to comply with the court order must
17 rise to the level of obstinacy, obduracy, or recalcitrance
18 to satisfy the willful disobedience standard.

19 I would submit, Your Honor, there's no proof of
20 willfulness, but there's certainly no proof of obstinacy,
21 obduracy, and recalcitrance. Tellingly, ePlus doesn't
22 talk about this standard in their brief, it doesn't try
23 and satisfy the civil contempt standard. It just jumps to
24 the Patent Act because it's convenient for it to do so in
25 this setting as opposed to the underlying award.

1 The next additional remedy that they ask you for,
2 Your Honor, is a coercive fine. Now, Your Honor asked a
3 question about this, which, I think, is an absolutely
4 spot-on question which is basically, how would I do this,
5 how would I know when compliance has occurred. And not
6 surprisingly, Your Honor, every case that we have been
7 able to find, and there are very, very few and far
8 between, every case we have found that gives a coercive
9 remedy does so where the injunction is an affirmative act,
10 a discrete affirmative act, and it's something like, you
11 know, you need to produce these documents by X date, or
12 you need to take this down from your website.

13 Now, obviously, a coercive fine going forward
14 that's based on something that's provable and that
15 discrete is one thing, but Your Honor hit on exactly the
16 issue. This is a prohibitive injunction. This is an
17 injunction that has to do with our dealings with 146
18 customers, and as you've noted, we often don't have
19 control or even full insight into what the customer is
20 doing and using.

21 You know full well, I think it's absolutely
22 something the Court needs to consider, that if you impose
23 this sort of a fine, a going-forward sanction, there will
24 be protracted battles over whether we have complied, and
25 that is why it is, in fact, not applied in such

1 circumstances where there is a prohibitive injunction that
2 is difficult to measure compliance.

3 It has not been used. It's rarely used in any
4 event, Your Honor, but I think the parties are in absolute
5 agreement that a coercive going-forward fine is only
6 appropriate when it can be purged readily through
7 compliance, you can avoid it as the party found liable for
8 contempt.

9 THE COURT: Is it your view that the law of the
10 regional circuit, as opposed to the Federal Circuit, is to
11 be used in determining whether there can be an award of
12 attorneys' fees on a motion for civil contempt?

13 MR. DUSSEAUT: Your Honor, my --

14 THE COURT: You cited the Fourth Circuit case.

15 MR. DUSSEAUT: Yes, sir. My understanding is
16 that in a civil contempt proceeding in this court with
17 issues that are not unique to patent law, that -- and from
18 reading the cases, this is what I have seen. They
19 typically draw from the circuit in which the Court is
20 presiding because it's not unique to patent law.

21 And, Your Honor, in a way, we're going in an
22 interesting circle. If this case is uniquely one of
23 patent law, then disgorgement should be off the table
24 because disgorgement is not available under patent laws.

25 But we have treated this case as one that's

1 proceeding as a civil contempt proceeding, and in civil
2 contempt proceedings, the law of this circuit would
3 control.

4 THE COURT: But it's a civil contempt proceeding
5 for violating an injunction issued in a Patent Act. I
6 don't think either one of you have really addressed that
7 issue in your papers. You have cited Fourth Circuit
8 cases, but the issue about what law applies hasn't really
9 been squared up.

10 MR. DUSSEAUT: I believe, Your Honor, just to
11 make sure one distinction --

12 THE COURT: Your view is it's regional circuit
13 law.

14 MR. DUSSEAUT: Yes, but to be clear, ePlus's
15 view is not just that it's Federal Circuit law, it's that
16 it's the actual Patent Act, it's the standard under the
17 Patent Act, and yet they are disregarding the Patent Act
18 with respect to the core remedy they are asking for.

19 THE COURT: Yes, I understand that.

20 MR. DUSSEAUT: The last point I'll make, Your
21 Honor, and I do appreciate the indulgence of time, is this
22 issue of RSS. Setting aside infringement and remedy for
23 infringement as to RQC, what about if the Court finds that
24 there's some ongoing use of RSS, and I would make two
25 points.

1 The first is, ePlus has the burden of proof and
2 has not submitted any proof, Your Honor, any proof at all,
3 that any of the 146 customers is continuing to use RSS.
4 They have to prove that. They have to prove that by clear
5 and convincing evidence. They can't just surmise and say,
6 well, you didn't turn it off so maybe people are doing it.
7 They haven't proven that, and that's not a remedies issue.
8 That's actually really a liabilities issue.

9 I would submit to Your Honor, if you are at all
10 concerned that you don't know whether a given customer who
11 had a given communication is one of the 146 customers or
12 is not, that's something that the parties could easily
13 agree on. There's no dispute over that. We could submit
14 a list to you, but I can tell you, Your Honor, that there
15 is no evidence in the record of actual use of RSS by the
16 146 customers at issue, and secondly, even if you could
17 find liability based on RSS, Dr. Ugone admitted in his
18 testimony that he chose not to calculate a measure of
19 remedy for customers using RSS.

20 Now, clearly, you can't just assume that the same
21 measure that applies for RQC use applies for RSS. There
22 would have to be some actual showing of which of the 146
23 customers used RSS and which of those revenues are
24 attributable to it, and there's no such evidence in the
25 record.

1 So, Your Honor, just to wrap up, we believe that
2 the appropriate remedy here is that they recover no remedy
3 because of their failure of proof. If the Court is to
4 award damages, it should be disgorgement only of the net
5 profit measure, either the net profit of the Punchout/EDI
6 or Punchout alone measure that we've set forth, or if the
7 Court believes that disgorgement of all revenues as to
8 configuration three and five is appropriate, then it
9 should be the net profit measure of that, or in no
10 instance, Your Honor, worse than the incremental profit
11 margin, nothing higher than the incremental profit margin
12 that ePlus's own expert endorsed is correct. Thank you.

13 THE COURT: Mr. Strapp, you don't have in your
14 brief either what law applies to the determination here of
15 the -- determination of entitlement to attorneys' fees and
16 a determination of willfulness here, the regional circuit
17 law or the Federal Circuit law.

18 MR. STRAPP: Both as to willfulness and as to
19 attorneys' fees, the governing standard is that of the
20 Federal Circuit, and we set that forth in our reply brief.
21 It's docket 1073. As to attorneys' fees, it's docket
22 1073, page 13 and 14 of the brief.

23 We quote a case called *Pharmacia & Upjohn v.*
24 *Mylan Pharmaceuticals*. It's 182 F.3d 1356 at 1359.

25 THE COURT: What page?

1 MR. STRAPP: Well, it's page 14 of the brief. If
2 you look at the top header, it will say page 18 of 21.
3 It's docket 1073.

4 THE COURT: I don't know that I have that
5 docket -- you all don't give me a docket number. Is it
6 footnote -- what page is it?

7 MR. STRAPP: If you carry over to the top of page
8 14, we have the site, second line. That case said that
9 Federal Circuit precedent governs the substantive
10 interpretation of 38 U.S.C. Section 385 which is unique to
11 patent law.

12 THE COURT: Well, is that where you are seeking
13 the attorneys' fees? 285 is the --

14 MR. STRAPP: Patent statute.

15 THE COURT: You are seeking a contempt citation.
16 You are not seeking attorneys' fees -- you are seeking
17 attorneys' fees under the patent law; is that right?

18 MR. STRAPP: Just like we're seeking contempt
19 under the patent law. We're applying the *TiVo* standards,
20 not the Fourth Circuit standards for contempt proceedings
21 here. We're working with the Federal Circuit structure
22 and foundation for how a contempt proceeding works.

23 THE COURT: You say, precedent governs the
24 substantive interpretation of 285 which is unique to
25 patent law. 285 is what statute?

1 MR. STRAPP: That's the attorneys' fees statute.

2 THE COURT: Right. That's where you are seeking
3 your attorneys' fees under; right?

4 MR. STRAPP: That's right.

5 THE COURT: Exceptional cases statute.

6 MR. STRAPP: That's right.

7 THE COURT: What case holds that in deciding this
8 case I look at -- in willfulness and attorneys' fees for
9 civil contempt, I use the law of the Federal Circuit
10 instead of the law of the regional circuit? They are
11 proposing the law of the regional circuit in their brief.
12 It's just a couple, three sentences.

13 MR. STRAPP: Your Honor, I think there was some
14 confusion, because there was, I think, an equation whether
15 intentional or not between willfulness and willful
16 violations. Those are two separate concepts.

17 The concept of willfulness is a term of art in
18 the patent law. Willfulness is a term of art that's used
19 specifically with respect to patent infringement. That's
20 governed by *In re: Seagate*, and that's both --

21 THE COURT: That's willful infringement.

22 MR. STRAPP: Correct.

23 THE COURT: I have to find out whether the
24 infringement that is the second component of the *TiVo*
25 analysis has been established, and to do that I look at

1 the test under the Federal Circuit law.

2 MR. STRAPP: That's correct.

3 THE COURT: And not the Fourth Circuit case he
4 cited on --

5 MR. STRAPP: Right. Our point is that *TiVo* has a
6 two-part test on colorability and infringement. You can
7 resolve both of those questions, and then the question is,
8 as to the infringement, was that willful infringement or
9 not willful infringement, and our point is that's governed
10 by *In re: Seagate*.

11 THE COURT: Because you are dealing with whether
12 an infringement is willful.

13 MR. STRAPP: Right.

14 THE COURT: Why aren't you dealing whether a
15 contempt is willful? Then, in that case, the Fourth
16 Circuit law applies as in --

17 MR. STRAPP: Your Honor, I would suggest it's a
18 multistep process. First you have colorability and
19 infringement under *TiVo*. Then you have willful
20 infringement under *Seagate*. That's the 2007 case. Then
21 you've got two additional questions. One is, do you or do
22 you not enhance damages, and you can enhance damages not
23 at all --

24 THE COURT: Whose law do I apply to determine
25 that?

1 MR. STRAPP: That, we also submit, is Federal
2 Circuit that governs. And the case there is *Read v.*
3 *Portec*.

4 THE COURT: What is the authority for trebling
5 it?

6 MR. STRAPP: The authority for trebling it is 35
7 U.S.C. 284.

8 THE COURT: That's the three times in the
9 event --

10 MR. STRAPP: It just says that the Court, in its
11 discretion, may enhance damages up to three times, and
12 then the substantive law that's developed interpreting
13 284, the most prominent case is the 1992 case, *Read v.*
14 *Portec*, and there's subsequent case law that looks to the
15 factors set forth in *Read* to determine whether or not the
16 infringement was such that damages should be enhanced.

17 And then finally, the question of attorneys'
18 fees, we submit, is governed by 35 U.S.C. 285. Now, there
19 was a suggestion and a colloquy about in a disgorgement
20 setting, can there ever be enhanced damages, can there
21 ever be attorneys' fees. The three cases that I
22 mentioned --

23 THE COURT: You are asking for disgorgement.

24 MR. STRAPP: Correct.

25 THE COURT: You are asking to turn over the gain.

1 MR. STRAPP: Right.

2 THE COURT: But if you triple the amount of the
3 gain, aren't you being punitive instead of depriving the
4 gain, depriving them of the gain?

5 MR. STRAPP: The compensatory remedy of
6 disgorgement, you are right, would be the gain. Now,
7 enhanced damages --

8 THE COURT: If you go three times the gain, then
9 you are no longer -- what you are doing is imposing a
10 punishment, not a compensatory remedy, as I understand the
11 argument being made by Lawson, and, frankly, there's a
12 fair amount of logical force to that. Whether there's
13 case law or not, I'm not sure.

14 MR. STRAPP: What the cases say is that the
15 compensatory remedy, per se, has to be compensatory. It
16 has to disgorge gains. It shouldn't be punitive. I agree
17 on that point of law. But the question is whether or not
18 that is sufficient remedy in this case, and Your Honor has
19 the authority to add on an additional remedy that wouldn't
20 be strictly compensatory in the sense that enhancing the
21 damages --

22 THE COURT: Wait just a minute. Let me ask you
23 this: Do you know of any case in which the Court has, in
24 a contempt situation, found disgorgement to be proper and
25 then multiplied the quantum of the disgorgement as the

1 amount of appropriate compensatory damages?

2 MR. STRAPP: No. The cases that --

3 THE COURT: This would be a landmark case then to
4 do that; right?

5 MR. STRAPP: I'm aware of three cases in the last
6 decade where there was disgorgement of gross profits
7 awarded in a patent contempt proceeding, and what's
8 interesting is that although enhanced damages -- there was
9 no multiplier in any of those three cases. All three of
10 those cases, attorneys' fees and costs were awarded.
11 That's the *Brine* case --

12 THE COURT: That's different. Attorneys' fees
13 and costs are different.

14 MR. STRAPP: That's true, and I agree that they
15 are two different standards.

16 THE COURT: I'm asking you now about the
17 enhancement.

18 MR. STRAPP: Right, and I'm answering candidly,
19 I'm not aware of a case where there was --

20 THE COURT: We're turning mother's picture to the
21 wall on that and going somewhere else.

22 MR. STRAPP: I'm not saying that either, because,
23 Your Honor --

24 THE COURT: I'm saying it.

25 MR. STRAPP: All right.

1 THE COURT: We'll quit discussing that now if you
2 don't know the case. If you want to argue by analogy,
3 then you can say, but by analogy, et cetera, and argue,
4 but that's all I'm saying.

5 MR. STRAPP: Understood. The only analogous
6 point I would make, Your Honor, is that what courts have
7 looked to in underlying patent infringement cases, not
8 patent contempt where enhanced damages was found and
9 upheld by the Federal Circuit, the predicate threshold for
10 getting there is whether there's willful infringement.

11 So we agree there's got to be a finding of
12 willfulness. There has to be this finding under *Seagate*
13 before you get to the question of enhanced damages, but if
14 you make that finding of willful infringement, we would
15 submit and strongly urge Your Honor to look at the *Read v.*
16 *Portec* factors and determine whether, in the totality of
17 the circumstances here and in your discretion, enhanced
18 damages are appropriate. That's all we would submit.

19 THE COURT: But *Read* wasn't a contempt case.

20 MR. STRAPP: It was not. It was not. Your
21 Honor, Mr. Dusseault made the point in his argument --

22 THE COURT: And you agree that in order to get
23 attorneys' fees, you have to qualify under the exceptional
24 case principle, and that here, you qualify by virtue of a
25 finding of willfulness or not at all?

1 MR. STRAPP: We qualify by a finding of
2 willfulness.

3 THE COURT: Willful infringement or not at all;
4 is that right?

5 MR. STRAPP: That's right. And I would submit
6 that there's additional factors Your Honor can take into
7 account in determining whether this was exceptional or not
8 beyond just willfulness, and some of those we've already
9 discussed.

10 Now, Mr. Dusseault said, in trying to explain Mr.
11 Hager's --

12 THE COURT: Excuse me. I think you just backed
13 away from what you just told me. As I understand it, the
14 finding of exceptional case under the facts of this case
15 can occur only if there's a finding of willfulness; is
16 that right?

17 MR. STRAPP: That's right.

18 THE COURT: What other factors would I take into
19 account other than willfulness?

20 MR. STRAPP: Litigation misconduct courts have
21 looked to in determining whether or not to award
22 attorneys' fees.

23 THE COURT: But there's no litigation misconduct
24 pointed to here.

25 MR. STRAPP: Well, we point to the --

1 THE COURT: I know about litigation misconduct.

2 MR. STRAPP: Your Honor, we point to the
3 misleading testimony at the injunction hearing.

4 THE COURT: So that's what you're saying.

5 MR. STRAPP: In combination with the --

6 THE COURT: Hager's testimony.

7 MR. STRAPP: The willful infringement alone is
8 sufficient. Your Honor can look to other circumstances
9 such as Mr. Hager's testimony if Your Honor decides that's
10 appropriate.

11 THE COURT: On Hager's testimony, Mr. Dusseault
12 pointed to a number of places and the brief points to a
13 number of places where in the briefing subsequent to the
14 hearing the topic of the design-around is mentioned.

15 Your point is simply to say that while a
16 design-around was mentioned, that they didn't disclose
17 what the actual facts were in order to clear up the
18 misapprehension left by Mr. Hager's testimony.

19 MR. STRAPP: That's correct. And if they had,
20 there wouldn't have been a sunset provision in the
21 injunction. One of the explanations that they offer is
22 they say nobody was asked -- nobody asked Mr. Hager
23 questions about a redesign at the actual injunction
24 hearing, and I just want to make two quick points about
25 that.

1 First of all, at the injunction hearing, neither
2 Your Honor nor ePlus at that point yet was aware of a
3 redesign, so there were no questions to ask. It wasn't
4 known.

5 The second point is, Mr. McDonald did actually
6 ask a question of Mr. Hager as follows: This is at pages
7 211 and 212 of the injunction hearing transcript, docket
8 727. You said, quote, if Lawson were enjoined from
9 servicing its existing RSS and Punchout customers, how
10 would that work?

11 So that was an opportunity for Mr. Hager to say,
12 well, if there is an injunction that prohibits servicing
13 existing customers, we'll either roll out a design-around
14 or our customers are going to be in trouble, but he didn't
15 mention the design around option.

16 THE COURT: Who asked that question?

17 MR. STRAPP: Mr. McDonald, who was, Lawson says
18 in its proposed findings of fact, actually involved in the
19 design-around, and that's defendant's proposed findings of
20 fact paragraph 38. They say that Mr. McDonald was one of
21 the lawyers who oversaw the design-around. So he knew
22 about it when he got up and asked that question.

23 Another point Mr. Dusseault made was there's no
24 evidence at all that ePlus suffered any harm, but I would
25 direct Your Honor's attention both to the first page of

1 ePlus's post-hearing reply brief on remedies and the
2 portion of that brief at page one where we quote from Your
3 Honor's order memorandum opinion concerning the
4 injunction, and that's docket 728 at 13 where Your Honor
5 found that ePlus had suffered harm in the form of lost
6 sales, lost market share, lost opportunities to cross-sell
7 and up-sell, and had to divert its resources away from
8 research and development. So that is evidence of harm
9 that's in the record.

10 Mr. Dusseault pointed on one of his slides to
11 deposition testimony that Mr. Farber gave in these
12 contempt proceedings, and specifically on slide 1208, Mr.
13 Farber was asked, did ePlus form a strategy to take
14 advantage of the injunction from a business perspective
15 after the injunction was entered, and Mr. Farber answered
16 no.

17 Now, I think that answer actually makes a lot of
18 sense because Lawson had made a free download available to
19 its customers and had also told its customers they could
20 continue using RSS. How was ePlus supposed to take
21 business away from customers who could continue using the
22 software they had been using?

23 THE COURT: Is there any evidence ePlus knew
24 about that, that they knew about it at the time when they
25 were making the decision not to go after the business?

1 Excuse me. I don't mean to be yelling at you,
2 but in an attempt to get this frog out of my throat, I
3 think I'm being loud. Is there any evidence that ePlus
4 knew about what Lawson was doing? No?

5 MR. STRAPP: The only evidence that ePlus knew at
6 the time was that -- the question was as to May 23rd,
7 2011, and afterwards. What ePlus knew at that time was a
8 free 20-minute download had been available on the
9 MyLawson.com website.

10 THE COURT: The answer to that question is no.

11 MR. STRAPP: The answer to that question is ePlus
12 didn't know a lot of facts, but it knew one fact which was
13 a design-around was made free to the customers.

14 THE COURT: But your point was, under the
15 circumstances that Lawson then actually had engaged in,
16 there would be no point for ePlus to go after the
17 business, and that was -- and the circumstances in which
18 ePlus had engaged were, one, making the download
19 available; two, telling them they could run it in parallel
20 with RSS.

21 MR. STRAPP: As to point two, ePlus did not know
22 at the time about point two, only point one.

23 THE COURT: Which brief are you talking about?
24 As to the remedies brief and mention of harm?

25 MR. STRAPP: Yes. That's ePlus's post-hearing

1 reply brief on remedies, very first page of the brief.

2 THE COURT: Opening brief?

3 MR. STRAPP: The reply brief. It's the one that
4 was filed on April 23rd.

5 THE COURT: I just want to know what you are
6 citing to. I didn't see it in the opening brief.

7 MR. STRAPP: Reply brief, it's the end -- the
8 last five lines of the first paragraph of the page
9 starting "and that ePlus in fact suffered."

10 THE COURT: Yes.

11 MR. STRAPP: Okay. Your Honor, Mr. Dusseault
12 made the point that under Fourth Circuit law, ePlus needed
13 to show but did not show that it was actually harmed in
14 order to have the disgorgement remedy available to it.

15 THE COURT: But you are saying that the Fourth
16 Circuit law doesn't apply. It either does or doesn't.
17 I'm not going to be switching back and forth between --

18 MR. STRAPP: Let's assume that -- I just want to
19 -- I don't want --

20 THE COURT: Is your point first that it doesn't
21 apply, that the Fourth Circuit law doesn't apply to the
22 remedy?

23 MR. STRAPP: My only point on this point is that
24 Your Honor already made a finding on this in the motion
25 denying the request to strike Dr. Ugone's testimony.

1 That's at docket 1032.

2 THE COURT: I can always revisit, but I'll hear
3 you on that, but I'm asking another question, and that is,
4 are you taking the position -- and that's the *Ashcraft*
5 case he's citing; is that right?

6 MR. STRAPP: That's what he's citing.

7 THE COURT: Is it your view that the Fourth
8 Circuit law doesn't apply here and I shouldn't be
9 considering that law? Yes or no? You said twice it
10 doesn't. I assume --

11 MR. STRAPP: Your Honor, as to disgorgement, I
12 don't have an answer to that question except to point you
13 to the Supreme Court precedent which controls here, and
14 that's the *Leman v. Krentler* case from the 1930s that Your
15 Honor still said --

16 THE COURT: That's not a Fourth Circuit case. I
17 mean that's not a Federal Circuit case.

18 MR. STRAPP: It's a Supreme Court case. It would
19 be binding on the Federal Circuit as well.

20 THE COURT: Now, your other point was?

21 MR. STRAPP: My other point was, if Your
22 Honor could turn to -- well, I don't have this in front of
23 everyone here, but at docket 1032, that is Your Honor's
24 order on the Ugone motion.

25 At page 11, Your Honor cited four cases, *Colonial*

1 *Williamsburg*, which is 792 F.Supp. 1397, that's an EDVA
2 case from 1992; *Buffalo Wings Factory*, 574 F.Supp. 2d 574.
3 That's EDVA, 2008. *Omega World Travel*, that's Fourth
4 Circuit, May 10th, 1990. Just three cases, I'm sorry, in
5 which Your Honor found those cases had all awarded
6 disgorgement of profits in civil contempt cases even where
7 the plaintiff did not quantify the harm.

8 So even under the Fourth Circuit standard that
9 Mr. Dusseault cites, Your Honor has already found that
10 Fourth Circuit cases hold otherwise.

11 THE COURT: What if I was wrong about that?
12 Shouldn't I correct it, or do I just go on marching along
13 with the wrong rule?

14 MR. STRAPP: I think it's important to get the
15 law right, and I would submit you got the law right the
16 first time around.

17 THE COURT: All right.

18 MR. STRAPP: I want to turn to the notion that
19 the appropriate award here would be net profits just on
20 the Punchout or just on the Punchout and EDI modules, and,
21 frankly, to me, that's sort of beyond the pale because --

22 THE COURT: 1213, slide 1213 is what he was
23 talking about?

24 MR. STRAPP: Yes. Because I think the one thing
25 that everyone agrees on here is we've seen maybe too much

1 of those building block charts. You don't want to go to
2 sleep and have nightmares over them in your head, but
3 you'll remember that there's lots of colors floating
4 around, and all of those colors and all of those modules
5 together make up configurations three and five, and
6 disgorging Lawson's gains from configurations three and
7 five means you look to all the modules, not just to the
8 ones floating around at the top. That's the only point I
9 want to make there.

10 Finally, with respect to the idea that this
11 proposal that Mr. Christopherson rejected from his
12 attorney about an additional modification that needed to
13 be made, Mr. Dusseault characterized that as an early
14 stage proposal or early on in the development.

15 Actually, that proposal was made by Lawson's
16 outside counsel in a document that's been admitted,
17 PX-1256. The date of that document is May 26th. That's
18 eight days after RQC had already been made generally
19 available to the public.

20 THE COURT: Didn't he also make the point that it
21 was something that was utterly impracticable to achieve?

22 MR. STRAPP: That's why they rejected the change.
23 You are right, Your Honor. But that was a change that the
24 attorney had proposed. Thank you.

25 THE COURT: That takes care of it?

1 MR. STRAPP: Yes.

2 THE COURT: The matter is submitted. Are you
3 all, as you usually do, getting transcripts of this
4 argument?

5 MR. STRAPP: Yes, sir.

6 THE COURT: Is there anything else that needs to
7 be done?

8 MR. DUSSEAULT: No, Your Honor.

9 MR. STRAPP: No, Your Honor.

10 THE COURT: Thank you all very much.

11

12 (End of proceedings.)

13

14

15 I certify that the foregoing is a correct
16 transcript from the record of proceedings in the
17 above-entitled matter.

18

19

20 /s/
21 P. E. Peterson, RPR

Date

22

23

24

25